TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 703

OLD COLONY TRUST COMPANY, TRUSTEE,
PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 4, 1937.

CERTIORARI GRANTED MARCH 15, 1937.

SUPREME COURT OF THE UNITED STATES

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INDEX.

	Original	Print
Proceedings in U. S. C. C. A., First Circuit	1	1
Caption, Cause No. 3145	1	1
Proceedings before United States Board of Tax Appeals	1	1
Docket entries	1	1
Petition	3	3
Exhibit "A"—Notice of deficiency	10	9
1—Vote of trust committee	17	13
2—Income available June 2, 1931, etc.	18	14
Answer	20	16
Motion to amend petition	21	17
Answer to amendment to petition	22	18
Stipulation of facts	22	18
Exhibit "A"—Trust instrument	28	24
"B"—Abstract of income tax return for 1931, fiduciary	35	31
"C"—Abstract of taxpayer's income tax return for 1931	37	32
"D"—Copy of Exhibit "B", summary of income account	38	34
"E"—Votes of appropriations and approval thereof	40	36
"F"—Opinion of Arthur T. Johnson	51	45

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 19, 1937.

—8851-C

	Original	Print
Proceedings before United States Board of Tax Appeals—Continued.		
Opinion, Murdock, M.	56	50
Dissenting opinion, Smith, M.	65	59
Motion for decision	67	60
Decision	68	62
Petition for review	69	62
Notice of filing petition for review	76	68
Præcipe for record	76	69
Notice of filing præcipe for record	77	70
Certificate of clerk (omitted in printing)	78	
Caption, Cause No. 3146	79	71
Proceedings before United States Board of Tax Appeals	79	71
Memorandum re proceedings	79	71
Petition for review	79	71
Notice of filing petition for review	84	75
Præcipe for record	84	76
Certificate of clerk (omitted in printing)	85	
Opinion, Wilson, J.	87	77
Dissenting opinion, Morton, J.	93	82
Minute entry of hearing	95	84
Final decree	95	84
Recital as to stay of mandate	95	84
Clerk's certificate (omitted in printing)	95	
Order allowing certiorari	97	85

[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

October Term, 1935

No. 3145

OLD COLONY TRUST COMPANY, Trustee, Petitioner for Review,

vs.

COMMISSIONER OF INTERNAL REVENUE

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 74928

OLD COLONY TRUST COMPANY, Trustee Under an Indenture of Trust of Paul Wilde Jackson, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Appearances:

For Petitioner: Francis V. Barstow, Esq.
For Respondent: Hartford Allen, Esq.

DOCKET ENTRIES

1934

Feb. 20. Petition received and filed. Taxpayer notified. (Fee paid.)
Feb. 21. Copy of petition served on General Counsel.
Apr. 21. Answer filed by General Counsel.
May 1. Copy of answer served on taxpayer.
Sept. 26. Hearing set Nov. 14, 1934.
Nov. 5. Motion to amend petition, embodying amendment, filed by taxpayer. 11/6/34, granted.
[fol. 2] Nov. 8. Copy of motion and amendment to petition served on General Counsel.
Nov. 12. Motion for continuance to Nov. 21, 1934, filed by taxpayer. 11/12/34, granted.
Nov. 15. Answer to amendment to petition filed by General Counsel.

DOCKET ENTRIES—Continued

1934.

Nov. 19. Copy of answer to amendment served on taxpayer.

Nov. 21. Hearing had before Mr. Murdock, Division 3, on merits. Oral argument on both sides. Stipulation of facts filed. Petitioner's brief filed at hearing—served on General Counsel—petitioner's reply in 30 days. Commissioner's brief filed—copy served—Commissioner allowed 30 days to reply.

Nov. 27. Transcript of hearing Nov. 21, 1934, filed.

Dec. 13. Reply brief filed by taxpayer. 12/14/34, copy served.

1935.

Oct. 29. Opinion rendered—Mr. Murdock, Division 3. Decision will be entered under Rule 50.

Nov. 29. Motion for decision under Rule 50 filed by General Counsel—no objection by taxpayer endorsed thereon. 12/2/35, copy served.

Dec. 13. Decision entered—Division 3.

1936.

Mar. 11. Petition for review by U. S. Circuit Court of Appeals, First Circuit, with assignments of error filed by General Counsel.

Mar. 11. Supersedeas bond in the amount of $43,000.00 approved and ordered filed.

Mar. 11. Petition for review by U. S. Circuit Court of Appeals, First Circuit, with assignments of error filed by taxpayer.

Mar. 11. Proof of service filed by taxpayer.

Mar. 11. Præcipe filed by taxpayer.

Mar. 11. Proof of service of præcipe filed by taxpayer.

Mar. 18. Proof of service of petition for review filed by General Counsel.

Apr. 7. Præcipe with proof of service thereon filed by General Counsel.

[fol. 3] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

PETITION—Filed February 20, 1934

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:AR:B-3) dated December 28, 1933, and as a basis of its proceeding alleges as follows:

(a) The petitioner is a corporation organized under the laws of the Commonwealth of Massachusetts and is the fiduciary named in a deed of trust made by Paul Wilde Jackson the 19th July, 1922. The principal office of the petitioner is located at 17 Court Street, Boston, Massachusetts.

(b) The notice of the deficiency (a copy of which is attached and marked "Exhibit A") was mailed to the petitioner on the 28th December, 1933.

(c) The taxes in controversy are income taxes for the calendar year 1931 and for $21,589.91.

(d) The determination set forth in the said notice of deficiency is based upon the following errors:

1. Including as taxable income for the year 1931 of the taxpayer amounts of income paid to annuitants in the year 1931 pursuant to the said deed of trust.

2. Including as taxable income of the taxpayer for the year 1931, amounts of income that, pursuant to the terms of the deed of trust, had been paid or permanently set aside in 1931 for charitable and educational purposes.

(e) The facts relied upon are as follows:

1. The Commissioner in his letter of December 28, 1933, has stated:

"The facts in this case disclose that specified amounts are payable to the annuitants, to be paid either from income or principal.

"When annuities are payable from income or principal, but are payable in any event, such amount is not taxable to [fol. 4] the recipient but is taxable to the trust as an entity.

See the decision of the United States Board of Tax Appeals in the case of Boston Safe Deposit and Trust Company, appearing in Volume 26, page 486."

This case was appealed to the Circuit Court of Appeals in the first circuit [66 Fed. (2d) 179] which sustained the decision of the Board of Tax Appeals. Since that time the case of Helvering v. Pardee, 78 U. S. Sup. Ct. 239, has been decided in which annuities payable from income or principal are decided to be legacies and not deductible from the taxable income of fiduciaries.

The petitioner's case is distinguishable in that the settlor makes it doubtful in section 13 of the deed of trust that the annuities are to be payable from income and principal or only confined to income.

2. The Commissioner in his letter of December 28, 1933, has stated:

"Your contention with respect to the second contention that the balance of the income is set aside for charitable purposes, cannot be conceded as it is not disclosed that payments were made out of income of the taxable year to the charities nor that any portion of the income was credited to any charity. See the decision of the United States Board of Tax Appeals previously referred to." [Boston Safe Deposit and Trust Company, 26 B. T. A. 486.]

3. Paul Wilde Jackson by a deed of trust dated July 19, 1922 conveyed to the taxpayer a large amount of property which, after making certain pecuniary gifts and providing for certain annuities, contained the following provisions:

"13. I authorize my said trustees to pay to charities as hereinafter described such sums as in their judgment may be paid without jeopardizing the annuities herein provided for, whenever for a period of one year the trust fund held by them as then invested shall have yielded a net income equal to twice the amount of the annuities which they are then required to pay, and upon the death of the survivor of those persons, who under the terms of this instrument are to receive annual incomes under the trust hereby created, [fol. 5] I direct my said trustees to distribute the rest and residue remaining in their hands among corporations and trustees organized, operating and holding exclusively for

religious, charitable, scientific, literary or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, the sum paid over by said trustees to such corporations or boards of trustees to be held by such corporations and boards of trustees in trust, and the income thereof to be expended for the general purposes for which such corporations and boards of trustees are organized, and I request that said funds be designated by each corporation or board of trustees as the Henry Clay Jackson Fund.

"14. I direct the trustees herein named to confine their selection of charities to those organized and administered by Protestants upon non-sectarian lines, not intending hereby to exclude a charity which has upon its board of management persons of other religious beliefs, but meaning and intending to exclude any charity controlled by persons of any race or religion which is non-Protestant and which is designed in the main to serve non-Protestants.

"I further direct that in selecting they give the preference to colleges for women, to homes for aged persons, and to hospitals for deformed and crippled children, the amount to be given to each to be determined by said trustees, but in accordance with the wish of my said brother I direct that they give to a considerable number of charities and that they endeavor to select such as will be likely to conserve the property given to them and to make the income thereof benefit a large number of persons.

"I direct that in making their selection they procure such advice as they may deem desirable, and that in the case of payments during my lifetime or that of my wife and daughter herein named they confer with me or with my said wife and daughter before making a gift to a charity, but subject to the directions hereinbefore set forth I give to them the final decision as to what corporations and boards of trustees shall receive the rest, residue and remainder of [fol. 6] the property transferred to them.

"I authorize the trustees hereunder in case they shall deem it wise so to do to organize new charities, to endow them, and to erect buildings for their use. I also authorize them if in their judgment it is wise so to do to erect buildings for existing colleges and educational institutions, for homes for aged persons, or for hospitals for deformed and crippled children."

4. The petitioner always maintained with respect to the trust funds a principal account and an income account and for the year 1931 the following are the facts:

a. The income account on January 1, 1931, amounted to $187,999.43.

b. The income for the year 1931 amounted to $114,417.36.

c. The annuities paid in 1931 amounted to $22,350.02. These annuities are by the terms of the deed of trust fixed in amount.

d. The payments to charities in 1931 were as follows:

Aug. 12, 1931, House of the Good Samaritan	$25,000
Sept. 3, 1931, House of the Good Samaritan	25,000
Sept. 12, 1931, Boston Floating Hospital	30,000
Nov. 9, 1931, House of the Good Samaritan	25,000
Dec. 16, 1931, Family Welfare Society of Boston	50,000
Dec. 16, 1931, Boston Provident Association	20,000
Dec. 16, 1931, Morgan Memorial	10,000
Dec. 16, 1931, Industrial Aid Society	5,000
Total	$190,000

The foregoing charities are of the kind referred to in the Revenue Act of 1928, Section 162 (a).

e. The income account on January 1, 1932, amounted to $89,553.89.

f. The petitioner, by vote of its trust committee passed November 1, 1929, appropriated not in excess of $200,000 for the erection of a building for the Boston Floating Hos- [fol. 7] pital, a charity of the kind referred to in the Revenue Act of 1928, Section 162 (a), and from time to time the petitioner paid to the Boston Floating Hospital from the accumulated income in satisfaction of the said appropriation $180,000 including $30,000 paid September 12, 1931. There remained thereafter and was paid $17,242.21 of this appropriation for completion of the building. A copy of the said vote of the trust committee is hereto attached marked "Exhibit 1".

g. The petitioner from time to time made payments to charities from the said trust and these payments were always appropriated from the income of the trust premises.

A copy of the income available June 2, 1931, together with the appropriation thereof and dates of the payments of the appropriations including $20,000 appropriated to the Salvation Army in 1931, which was not in fact paid until January 20, 1932, is hereto attached marked "Exhibit 2". The Salvation Army is a charity of the kind referred to in the Revenue Act of 1928, Section 162 (a).

h. The principal of the trust fund as shown on the books of the petitioner on January 1, 1931 amounted to $1,922,-702.51 and on January 1, 1932 amounted to $1,989,043.50. The trust fund was transferred to the petitioner May 29, 1923, on which date the principal and income accounts were opened and the first income was received June 20, 1923. The income of the trust fund since such transfer has been more than sufficient to pay the annuities and the annuities have been paid from such income.

i. The petitioner is informed and believes that the youngest person who received an annuity in 1931 was over sixty-five years of age and the oldest person was over seventy-five years of age.

5. The petitioner was authorized by section 13 of the deed of trust, to pay in the year 1931 to the charities described therein (which are the kind of charities referred to in the [fol. 8] Revenue Act of 1928, Section 162 (a)), all of the net income that was not used in paying the small amount needed for the annuities and, whether paid or not, the annuitants could not have compelled the petitioner to retain such income to be held as a fund to secure the payment of their annuities.

6. The petitioner was authorized by section 13 of the deed of trust, to pay in the year 1931 to the said charities the amount represented by the gains from the sale of securities in 1931 amounting to $61,481.32 and the annuitants could not have compelled the petitioner to retain the said amount represented by gains as a fund to secure the payment of their annuities.

7. Section 162 (a) of the Revenue Act of 1931 provides in respect of taxable income of a fiduciary:

"(a) There shall be allowed as a deduction (in lieu of the deduction for charitable and so forth contributions au-

thorized by section 23 (n)) any part of the gross income, without limitation, which pursuant to the terms of the will or deed creating the trust, is during the taxable year paid or permanently set aside for the purposes and in the manner specified in section 23 (n), or is to be used exclusively for religious, charitable, scientific, literary or educational purposes, or for the prevention of cruelty to children or animals, * * *"

The deed of trust defines the charities in section 13 to which payments may be made as—

"corporations or trustees organized, operating and holding exclusively for religious, charitable, scientific, literary or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, * * *"

And in section 14 limits the kind of charities within the above classification.

8. "Taxation is an intensely practical matter."
Farmers Loan & Trust Co. v. Minnesota, 280 U. S. 204, 212.
[fol. 9] City Bank Farmers Trust Co. v. United States, decided January 30, 1934, by the Supreme Court.

"The statutes imposing taxes are estimated by practical results more than legal fictions."
City Bank Farmers Trust Co. v. United States (supra).
Nichols v. Coolidge, 274 U. S. 531, 541.
Tyler v. United States, 281 U. S. 497, 503.
Lawrence v. State Tax Commission, 286 U. S. 276, 286.

There is no irrefutable presumption that the income and gains for 1931 in excess of the annuity payments may be needed to pay annuities in the future years.
United States v. Provident Trust Company, decided February 5, 1934, by the Supreme Court.
City Bank Farmers Trust Co. v. United States (supra).
Ithaca Trust Co., Executor, v. United States, 279 U. S. 151.

The practical aspect in this case is that if the facts of human experience count for anything, the amounts of income in the year 1931 in excess of the annuity payments and the gains for that year are without limitation permanently set

aside to be used exclusively for the charitable purposes set forth in the Revenue Act of 1928, Section 162 (a). By the end of the year 1933 all of the income in excess of the annuities of the years 1931, 1932 and 1933 had in fact been paid out to such charities.

Wherefore the petitioner prays that this Board may hear the proceeding and determine:

1. That the payments of the annuities are in the nature of payments from the income of the trust fund and are deductible in determining the taxable income of the petitioner for the year 1931; and

2. That all net income of the year in excess of the amount necessary to pay the annuities and all taxable income resulting from gains made in the year 1931 are deductible in determining the taxable income of the petitioner for the [fol. 10] year 1931 pursuant to the terms of Section 162 (a) of the Revenue Act of 1928.

Francis V. Barstow, Counsel for Petitioner, 53 State Street, Boston, Mass.

Duly sworn to by E. L. Swett. Jurat omitted in printing.

EXHIBIT "A" TO PETITION

Treasury Department

Office of Commissioner of Internal Revenue

Washington, Dec. 28, 1933.

Old Colony Trust Company, Trustee, Trust u/d Paul Wilde Jackson (T-1031), 17 Court Street Boston, Massachusetts

SIRS:

You are advised that the determination of your income tax liability for the year(s) 1931 discloses a deficiency of $21,589.91 as shown in the statement attached.

In accordance with section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of the deficiency.

However, if you do not desire to petition, you are re- [fol. 11] quested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this form will expedite the closing of your return(s) by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier; whereas if this form is not filed, interest at the rate of 6% per annum will accumulate.

Respectfully, Guy T. Helvering, Commissioner, by Chas. T. Russell Deputy Commissioner.

Enclosures: Statement. Form 870. Schedule.

Statement

IT:AR:B-3. DPS-60D.

In re: Old Colony Trust Company, Trustee, Trust u/d Paul Wilde Jackson (T-1031), 17 Court, Street, Boston, Massachusetts

Income Tax Liability

Year	Tax Liability Income	Tax Assessed Income	Deficiency
1931	$21,589.91	None	$21,589.91

Reference is made to the report prepared by Revenue Agent M. E. Lynch, and transmitted to you under date of August 28, 1933, to your protest subscribed to under date of September 13, 1933, and to report on conference held in the office of the internal revenue agent in charge at Boston, Massachusetts, on October 9, 1933.

Careful consideration has been accorded your protest and reference is made to office letter dated November 25, 1933, in which you were advised of the approval of the report.

The only issues presented at conference held in the office of the internal revenue agent in charge were the taxability by the trust of amounts paid to annuitants and whether the income of the trust has been permanently set aside for charitable and educational purposes.

The facts in the case disclose that specified amounts are payable to the annuitants, to be paid either from income or principal.

[fol. 12] When annuities are payable from income or principal, but are payable in any event, such amount is not taxable to the recipient but is taxable to the trust as an entity. See the decision of the United States Board of Tax Appeals in the case of the Boston Safe Deposit and Trust Company, appearing in Volume 26, page 486.

Your contention with respect to the second contention that the balance of income is set aside for charitable purposes, cannot be conceded as it is not disclosed that payments were made out of income of the taxable year to the charities nor that any portion of the income was credited to any charity. See the decision of the United States Board of Tax Appeals, previously referred to.

Since it is stated in a letter dated December 7, 1933, from your representative, Mr. Francis V. Barstow, that you do not desire a hearing in Washington although you do not agree to the proposed adjustments, it is necessary at this time to issue this formal notice of deficiency.

Net income reported on return		$ None
Additions:		
1. Increase in income from fiduciary	$9,885.65	
2. Elimination of loss on sale of securities	1,409.25	
3. Increase in dividends	11,248.01	
4. Elimination of other deductions	80,315.16	102,858.07
Net income as adjusted		$102,858.07
5. Capital net gain as adjusted		61,481.32
Total income as adjusted		$164,339.39

The income of $164,339.39 represents the entire income as adjusted on Fiduciary return Form 1041, which is held to be the taxable income of the trust due to including distribution to annuitants and the elimination of amounts claimed to have been set aside for charitable and educational purposes.

Net income as reflected on fiduciary return has been increased from $151,669.39 to $164,339.39 due to a reduction in the loss from the sale of securities and an increase in the amount of the capital net gain as shown in the accompanying schedule.

[fols. 13-14] Net income as adjusted		$164,339.39
Less:		
Capital net gain		61,481.32
Income subject to surtax		$102,858.07
Less:		
Dividends	$53,583.53	
Personal exemption and credit for dependents	1,500.00	55,083.53
Balance subject to normal tax		$47,774.54
Normal tax at 1½% on $4,000.00	$60.00	
Normal tax at 3% on $4,000.00	120.00	
Normal tax at 5% on $39,774.54	1,988.73	
Surtax on $100,000.00 $11,660.00		
Surtax on $2,858.07 at 20% 571.61	12,231.61	
Tax at 12½% on capital net gain of $61,481.32	7,685.17	
		$22,085.51
Less tax paid at source		495.60
Total tax assessable		$21,589.91
Tax previously assessed		None
Deficiency in tax		$21,589.91

(Here follows Paster Table, folios 15 and 16)

[fols. 15-16]
IT:AR:B-3. DPS.
Old Colony Trust Company, Trustee (T-1031)
Trust u/d Paul Wilde Jackson (1041)

Sales of Securities

		Date Acquired	Date of Sale	Proceeds of Sale	Basis Reported	Profit or (Loss) as reported		Basis as Corrected	Increase or (decrease) in basis	Profit or (Loss) as corrected
330 shares Boston Elevated Ry. Co. 2nd Pfd	(1)	10/1/23	1/13/31	$28,960 80)			97½	$32,175 00)		($3,214 20)
70 " " " " " " "	(1)	"	1/15/31	6,178 20)	$39,200 00	($4,061 00)	97½	6,825 00)	($ 200 00)	(646 80)
184 shares Atchison, Top. & San Fe. Pfd	(1)	"	1/16/31	19,015 64	16,169 00	2,846 64	87 15/16	16,180 50	11 50	2,835 14
500 shares U. S. Steel Pfd	(1)	"	1/20/31	72,855 00	55,687 50	17,167 50	117 15/16	58,968 75	3,281 25	13,886 25
$1 M Atchison, Top. & Santa Fe Adj. 4s-1995	(1)	"	2/13/31	988 75	876 25	112 50	78½	782 50	(93 75)	206 25
$9 M " " " " " Gen. 4s-1995	(1)	"	2/13/31	8,595 00	7,065 00	1,530 60	87½	7,875 00	810 00	720 00
14 shares Island Creek Coal Co. Pfd	(1)	7/19/24	2/4/31	1,466 46	1,337 00	129 46	92	1,288 00	(49 00)	178 46
$15 M South Utah Mines & Smelters 6%	(1)	6/9/24	3/4/31	1,240 65	1	1,239 65		1 00		1,239 65
100 shares Standard Oil Co. of N. Y	(3)	12/23/29	3/28/31	2,211 50	3,287 50	(1,076 00)		3,287 50		(1,076 00)
200 " " " " N. J	(3)	1/29/31	"	9,193 00	9,630 00	(437 00)		9,630 00		(437 00)
500 Rights Public Serv. Corp. of N. J			4/1/31	3 44		3 44				3 44
450 shares National Lead Co. Com	(2)	10/1/23	4/3/31	53,944 50	34,875 00)	19,069 50		(		
150 " " " " Class B Pfd	(2)	6/11/27	4/3/31	17,675 25	16,050 00)	1,625 25		(35,362 50	(15,562 50)	36,257 25
178 " " " " Class A Pfd	(2)	10/1/23	4/3/31	24,890 63	19,758 00	5,132 63		19,980 50	222 50	4,910 13
100 shares U. S. Envelope Co. Pfd	(2)	"	4/18/31	12,150 00	11,990 00	160 00	109	10,900 00	(1,090 00)	1,250 00
$22 M Kingdom of Norway 6's, 1943		2/7/24	6/26/31	23,265 00	20,725 50	2,539 50		20,725 50		2,539 50
$25 M Kingdom of Sweden 5½s, 1954		2/3/25	7/3/31	26,250 00	24,933 75	1,316 25		24,933 75		1,316 25
$17 M Jersey Central Pr. & Lt. 5½-1945 Called	(3)	1/22/31	8/10/31	17,595 00	17,491 25	103 75		17,491 25		103 75
$16 M People's Gas Lt. & Coke 5s-1976 Called	(3)	9/6/28	8/11/31	16,800 00	15,970 25	829 75		15,970 25		829 75
Totals				$343,278 82	$295,047 00	$48,231 82		$282,377 00	($12,670 00)	$60,901 82
Decrease in basis					(12,670 00)	12,670 00				
Totals as corrected				$343,278 82	$282,377 00	$60,901 82				
(3) Amount allocated to sales of securities held less than 2 years and bonds called				45,799 50	46,379 00	(579 50)				
Amount allocated to Capital Net Gain				$297,479 32	$235,998 00	$61,481 32				

(1) Dates acquired as stated above represent dates on which distribution of securities were made to grantor by administrators of Estate of Henry C. Jackson.
Bases as corrected represent market values on dates of such distributions.
Bases as reported on original return were market values on May 21, 1922, date of death of Henry C. Jackson.
(2) See Exhibit A-1.

National Lead Company

October 1, 1923	400 shares common received by grantor in distribution by administrators of Est. Henry C. Jackson, Market Value 10/1/23 at 117 7/8	$47,150 00
March 9, 1925	100 shares sold	11,787 50
	300 shares balance	$35,362 50
June 11, 1927	150 shares common and 150 shares Class B Pfd. stock dividend	
	450 shares common and 150 shares Class B Pfd	$35,362 50
October 1, 1923	178 shares Class A Pfd. received by grantor in distribution by administrators of Estate of Henry C. Jackson. Market Value 10/1/23 at 112 1/4	$19,980 50

[fol. 17] *Petition.*

EXHIBIT 1 TO PETITION

File Envelope. Received 11/6/29.

T 1031

Voted:—That in exercise of the discretion given Old Colony Trust Company as Trustee under Deed of Trust exeeuted by Paul Wilde Jackson, dated July 19, 1922, the company's officers are hereby authorized to pay over to or for the benefit of the Boston Floating Hospital a sum not in excess of two hundred thousand dollars ($200,000) upon receiving the undertaking of the Trustees of said hospital to apply the same to the erection of a building for the use of the hospital substantially in accordance with the published plans for the proposed new New England Medical Center. In making such payment arrangement shall be made that the building shall be designated as a memorial to Henry Clay Jackson or that, otherwise, it shall be identified with his name and that of his brother Paul Wilde Jackson.

Passed by Tr. Com. 11/17'29. CBH.

[fol. 18]

EXHIBIT 2 TO PETITION

Paul Wilde Jackson Trust Fund
Income Available June 2, 1931, $180,000

Organization	Amount Appropriated	Amount and Date Paid
House of the Good Samaritan Cor. Francis & Binney Sts. Boston, Mass.	A sum not in excess of $75,000. to make an addition to its hospital, with appropriate inscription. (Approved Jan. 30, 1931)	$25,000. August 12, 1931 25,000. Sept. 3, 1931 25,000. Nov. 9, 1931
Industrial Aid Society 35 Chardon Street Boston, Massachusetts.	$5,000. to establish a permanent fund to be known as Henry Clay Jackson Fund income only to be used for general purposes.	5,000. Dec. 16, 1931
Family Welfare Society of Boston 41 Hawkins Street Boston, Mass.	$50,000. to establish a permanent fund to be known as Henry Clay Jackson Fund income only to be used for general purposes.	50,000. Dec. 16, 1931

[fol. 19]

Boston Provident Association 41 Hawkins Street Boston, Mass.	$20,000. to establish a permanent fund to be known as Henry Clay Jackson Fund income only to be used for general purposes.	20,000.	Dec. 16, 1931
The Morgan Memorial Cooperative Industries & Stores, Inc. 89 Shawmut Avenue, Boston, Mass.	$10,000. to establish a permanent fund to be known as Henry Clay Jackson Fund income only to be used for general purposes.	10,000.	Dec. 16, 1931
Salvation Army 8 E. Brookline Street Boston, Mass.	$20,000. to establish a permanent fund to be known as Henry Clay Jackson Fund income only to be used for general purposes.	20,000.	Jan. 20, 1932

Approved Dec. 31, 1931.

Committee (GORDON ABBOTT.
(C. B. HUMPHREY,
(FRANCIS R. HART.

[fol. 20] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

ANSWER—Filed April 21, 1934

The Commissioner of Internal Revenue, by his attorney, Robert H. Jackson, General Counsel, Bureau of Internal Revenue, for answer to the petition filed in the above-entitled proceeding, admits and denies as follows:

(a) Admits the allegations contained in paragraph (a) of the petition.

(b) Admits the allegations contained in paragraph (b) of the petition.

(c) Admits that the taxes in controversy are income taxes for the calendar year 1931. Denies that the Commissioner erred as alleged in paragraph (d) of the petition, subparagraphs 1 and 2.

(e) 1. Avers that there are no material allegations of fact contained in subparagraph 1 of paragraph (e) of the petition and moves that the same be stricken therefrom. Further answering said subparagraph the Commissioner denies all allegations contained therein.

(e) 2. Avers that there are no material allegations of fact contained in subparagraph 2 of paragraph (e) of the petition and moves that the same be stricken therefrom. Further answering said subparagraph the Commissioner admits the allegations contained therein.

(e) 3. Admits that Paul Wilde Jackson, by a deed of trust, conveyed to the Old Colony Trust Company a large amount of property. Denies all other allegations contained in paragraph (e), subparagraph 3, of the petition.

(e) 4. Denies the allegations contained in paragraph (e), subparagraph 4, of the petition.

(e) 5. Denies the allegations contained in paragraph (e), subparagraph 5, of the petition.

(e) 6. Denies the allegations contained in paragraph (e), subparagraph 6, of the petition.

(e) 7. Avers that there are no allegations of fact con-
[fol. 21] tained in subparagraph 7 of paragraph (e) of the petition and moves that the same be stricken therefrom.

(e) 8. Avers that there are no allegations of fact contained in subparagraph 8 of paragraph (e) of the petition and moves that the same be stricken therefrom.

Denies generally and specifically each and every allegation contained in the petition not hereinabove expressly admitted, qualified or denied.

Wherefore it is prayed that the Board redetermine the correct amount of the deficiency involved in this proceeding to be equal to the amount determined by the Commissioner, viz., $21,589.91.

Robert H. Jackson, General Counsel, Bureau of Internal Revenue. Of Counsel: Edward L. Updike, F. R. Shearer, Special Attorneys, Bureau of Internal Revenue.

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

MOTION TO AMEND PETITION—Filed November 5, 1934

Now comes the petitioner by its counsel, Francis V. Barstow, and moves that the petition in the above-entitled case be amended by striking out sub-paragraph (d) 2 of the said petition relating to the alleged errors in the Commissioner's notice of deficiency tax and inserting in lieu thereof the following.

(d) 2. Including as taxable income of the taxpayer for the year 1931 amounts of income, including gains from the sale of securities, that pursuant to the terms of the Deed of Trust have, in accordance with the provisions of the Revenue Act of 1928, Section 162 (a), been paid or permanently set aside for the purposes and in the manner specified in section 23 (n) of the said Act or have been used exclusively for religious, charitable, or educational purposes or for the prevention of cruelty to children.

Francis V. Barstow, Counsel for the Petitioner.

Dated October 29, 1934.

[fol. 22] I consent to the allowance of the foregoing motion.

Commissioner of Internal Revenue.

Granted November 6, 1934.

Eugene Black, Member United States Board of Tax Appeals.

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

ANSWER TO AMENDMENT TO PETITION—Filed November 15, 1934

Now comes the respondent, by his attorney, Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, and for answer to amendment to petition of the above-named taxpayer admits and denies as follows:

(d) 2. Denies the allegations of paragraph (d) 2 of the amendment to petition.

Denies generally each and every allegation of the amendment to the petition not hereinbefore specifically denied.

Wherefore it is prayed that the petition as amended be denied.

Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue. Of Counsel: Hartford Allen, Special Attorney, Bureau of Internal Revenue.

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

STIPULATION OF FACTS—Filed at Hearing November 21, 1934

It is hereby stipulated and agreed by and between the parties hereto, by and through their respective attorneys of record, that the following correct statement of facts may be offered in evidence in the above-entitled proceeding,

subject to the right of either party to object to the materiality or relevancy of any of the facts so stipulated.

[fol. 23] 1. Paul Wilde Jackson of Braintree, Massachusetts, by an instrument dated July 19, 1922, established a living trust and named as trustees therein the Old Colony Trust Company, a Massachusetts corporation, and George E. Brock of Boston, Massachusetts. George E. Brock died June 10, 1923, and the Old Colony Trust Company has, since the death of Mr. Brock, been the surviving trustee. A copy of the trust instrument is attached hereto marked "Exhibit A".

2. The taxpayer filed a fiduciary return of income upon Form 1041 for the calendar year 1931 with the Collector of Internal Revenue at Boston, Massachusetts. The said return showed net income of $151,669.39, all of which, except the income from gains, was apportioned to annuitants and to the taxpayer. The income from gains was allocated to the taxpayer as an addition to the principal of the trust. An abstract of the return showing all items (other than those marked "None") and all schedules (other than those marked "None") is hereto annexed marked "Exhibit B".

3. The taxpayer filed an individual income tax return upon Form 1040 for the calendar year 1931 with the Collector of Internal Revenue at Boston, Massachusetts, in which return there was disclosed a total income of $80,315.16 and a deduction of a similar amount as "Set aside for Charitable and Educational Purposes". It also showed in Schedule D that capital gains of $49,641.07 were "Set aside for Charitable and Educational Purposes". An abstract of the return showing all items (other than those marked "None") and all schedules (other than those marked "None") is hereto annexed marked "Exhibit C".

4. The revenue agent who examined the returns and the books of the taxpayer made the following changes:

(a) Increased the net income to $164,339.39 (a change to which the taxpayer agrees), said figure including $60,901.82 net profit realized from the sale of securities.

(b) Allocated all of the taxable income to the taxpayer.

(c) Permitted the taxpayer no deductions for income distributed to annuitants or for the income which the taxpayer

claimed was set aside for charitable and educational purposes.

[fol. 24] (d) Computed a deficiency tax of $21,589.91 upon the entire net income as payable by the taxpayer.

(e) Set forth as Exhibit B a summary of the income of the trust exclusive of profits on sales of securities for the year 1931 as disclosed by the income cash records of the trust kept by the taxpayer which the taxpayer agrees is accurate. A copy of the said Exhibit B is hereto annexed marked "Exhibit D".

5. Over protests timely made by the taxpayer, the Commissioner of Internal Revenue approved the revenue agent's report, determined the deficiency tax in accordance therewith and notified the taxpayer by letter dated December 28, 1933, a copy of which appears as Exhibit A to the taxpayer's petition.

6. The first receipt of principal by the taxpayer under the trust was on May 29, 1923, and upon that date separate ledger sheets for the principal, and for the income (exclusive of profits from sales of corpus) of the trust were opened. The first receipt of income was on June 30, 1923. The principal (corpus) account has always been maintained separate and apart from the income account. No annuity payment or payments to charitable organizations have been charged on the books to the principal account, which account includes accumulated profits from sales of securities.

7. The amount of income of the trust for each year since the taxpayer has held the principal has been more than twice the aggregate of the annuity payments required in such year by the terms of the trust and the taxpayer considered that it had power to pay to charities defined in the trust instrument such parts of the principal and income of the trust as in its judgment could be paid without jeopardizing the annuities, except that during the life of the grantor or his wife and daughter the trustee was obliged to confer with the grantor or his wife and daughter before making a gift to charity. The grantor died June 21, 1928, his wife June 30, 1928, and his daughter October 26, 1923.

8. The taxpayer considered that it had power to make gifts from the principal and income of the trust to charities

and it also has considered that all of the trust properties in excess of that part of the income which it considered necessary for the trust expenses and annuity payments be- [fol. 25] longed to charities. Since 1925 it has appropriated and/or paid certain sums to specific charities as hereinafter set forth. The grantor while living approved such gifts. The year, income (exclusive of profits) available, as computed by the taxpayer, appropriations, number of charities and the years in which payments were made, as shown by the records of the taxpayer, are as follows:

Year	Income Available	Amount Appropriated		Number of Charities		Year of Payment
1925 To April 16,	$60,000	$60,000		12		1925
1926 To June 11,	109,000	109,000		3		1926
1927 To June 2,	119,000	0		0		0
1928 To June 2,	214,000	100,000		1		1928
1929 To June 2,	201,000	200,000		1	$150,000	1930
					30,000	1931
					17,242.21	1932
1930 To June 2,	90,000	0		0		0
1931 To June 2,	180,000	180,000		6	160,000	1931
					20,000	1932
1932 To Dec. 31,	113,000	110,000	May 6, 1933	6		1933
1933 To Dec. 28,	60,000	60,000		2		1933

The cash income account, which did not include profits of $60,901.82 from the sales of securities, as maintained by the taxpayer disclosed an unexpended cash balance on December 31, 1931, of $89,553.99. The detailed items of said account are hereinafter set forth. Copies of the votes of appropriations and formal approval of appropriations by the taxpayer to charities are hereto annexed marked "Exhibit E".

9. The fiscal years for determining the amounts which the taxpayer considered to be surplus income available for charities ended June 2d of each year. In the year 1932 this was changed to the calendar year basis.

10. The receipts for the year 1931, exclusive of profits on sales of securities up to and including June 2, 1931, amounted to $60,646.25 and the disbursements for expenses and annuities amounted to $10,148.35, leaving a balance of $50,497.90, and from June 2, 1931, up to and including December 31, 1931, amounted to $57,391.86, and the disbursements for expenses and annuities amounted to $22,-605.16, leaving a balance of $34,786.70.

[fol. 26] 11. The Boston Floating Hospital, to which $30,-000 credited in the trust fund income account was paid in

1931, and the House of The Good Samaritan, the Industrial Aid Society, the Family Welfare Society of Boston, the Boston Provident Association and the Morgan Memorial Cooperative, to which in the aggregate $160,000 credited in the trust fund income account was appropriated and paid in 1931, and the Salvation Army, to which $20,000 credited in the trust fund income account was appropriated in 1931 and paid in January, 1932, are the kind of charities referred to in Section 162 (a) of the Revenue Act of 1928.

12. The Children's Hospital, the Community Health Association, the Family Welfare Society of Boston, the New England Home for Little Wanderers and the Massachusetts Society for Prevention of Cruelty to Children, all of Boston, Massachusetts, and the Convalescent Home of the Children's Hospital of Wellesley, Massachusetts, to which in the aggregate $110,000 credited in the trust fund income account was appropriated and paid in May 1933, are the kind of charities referred to in Section 162 (a) of the Revenue Act of 1928.

13. The book value of the principal of the trust was $1,922,702.51 on January 1, 1931, and $1,989,043.50 on January 1, 1932. The market value of the securities and cash in the principal of the trust on January 2, 1931, was $2,119,835.81 and on December 31, 1931, was $1,488,140.43. The trust funds were invested in ninety-one different kinds of securities and $37,045.18 cash on January 2, 1931, and in ninety different kinds of securities and $230.30 cash on December 31, 1931. No part of the trust funds was invested in real estate and almost all of the securities were readily marketable. The total income received (exclusive of profits on sales of securities) or debits to the taxpayer in 1931 (including coupons due in 1931 but taken into the account in 1930 and excluding coupons due in 1932 and taken into the account in 1931) as shown by the income cash sheets of the trust kept by the taxpayer was $118,038.11 and the total payments, or credits to the taxpayer, exclusive of payments to charities, as shown from the said sheets was $32,753.51. [fol. 27] 14. The total annuities distributed or distributable in 1931 and the ages of the annuitants were as follows:

Annuitant	Age	Annuity
Selina H. Butler	54	$3,600
Alice E. Butler	62	1,500
Edgar Jason Ames	73	1,300
Claribel M. Waterman	63	1,000
Mary Smith	65	1,000
Annie Marston	74	1,000
Mary J. Kendal	85	2,000
Frederick H. Jackson	59	10,000
Harriet E. Butler	55	1,500
Total		$22,900

15. About the time the taxpayer appropriated the first sums to charities it requested an opinion from Arthur T. Johnson, Esq., the attorney who drafted the Paul Wilde Jackson trust, regarding the meaning of Sections 13 and 14 of the trust indenture and received from Mr. Johnson an opinion dated May 14, 1925. A copy of the said opinion is hereto annexed marked "Exhibit F".

16. Prior to January 1, 1931, there had been set aside the $300,000 referred to in Section 2 of the indenture of trust and also prior to the said date the taxpayer had paid the pecuniary gifts referred to in Sections 3, 4, 5 and 12 of the said indenture of trust and on January 1, 1931, the only payments to be made from the trust premises, in addition to the expenses of the taxpayer in managing the trust, including in such expenses its commission, were the annuities referred to in Sections 5, 6, 7, 8, 9, 10 and 11 and the gifts to charities referred to in Section 13 of the said indenture of trust.

17. The cost of purchasing annuities for all of the annuitants of 1931 at their ages in that year if purchased during the first six months of 1931 from The New York Life Insurance Company would have been $220,804.33.

18. In estimating the $180,000 income which the taxpayer considered to be available for charities June 2, 1931, the taxpayer took the total income upon that date as shown [fol. 28] upon its income cash sheet (which excludes profits on sales of securities), deducted $50,000 which represented the unpaid portion of $200,000 appropriated to the Boston Floating Hospital in 1929 and also deducted its commis-

sion to be charged against the income which had not already been paid and a reserve for taxes. The taxpayer's commissions and the reserve for taxes were deducted in other years in estimating the income which the taxpayer considered to be available for charities.

19. The taxpayer's returns were made upon a cash receipts and disbursements basis.

Francis V. Barstow, Attorney for the Petitioner.
Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue.

EXHIBIT "A" TO STIPULATION

(T1031 T1031A T1031B T1031C)

Deed of Trust—Paul Wilde Jackson

Know all Men by these Presents, That whereas my brother, Henry Clay Jackson, late of Boston in the Commonwealth of Massachusetts, deceased, was prevented by death from executing a will, the provisions of which had been determined upon by him, I, Paul Wilde Jackson, of Braintree in said Commonwealth, for the purpose of substantially carrying out the wishes of my said brother, do hereby give, grant, assign, transfer and deliver unto George E. Brock, of said Boston, and the Old Colony Trust Company, a banking corporation having its usual place of business in said Boston, all the right, title and interest which I as the sole heir of my said brother have or may hereafter have in and to that portion of the property of which he died seized and possessed which remains after his debts, funeral charges and expenses of administration including taxes have been paid, except the right to the sum of seventy-five thousand (75,000) dollars, which sum I reserve for myself, the said George E. Brock and the said Old Colony Trust Company to have and to hold the property which [fol. 29] they receive, together with its accumulations in trust for the following uses and purposes:

Whenever the estate of my said brother shall be distributed and the administrators thereof, who are the same persons herein named as trustees, shall take title thereto as trustees, I direct that they —

1. Expend from time to time such sums as in their judgment are required for the care and maintenance of the mausoleum of my said brother situated in Forest Hills Cemetery in said Boston, and if at any time it shall seem wise to them to set up a fund, the income of which will provide for the perpetual maintenance and repair of said mausoleum and the care of its lot, or to make payment of a lump sum to the Proprietors of said Cemetery, in return for a binding agreement to perpetually maintain and repair said mausoleum and care for said lot, then they are authorized to set up such fund or to make such payment.

2. Set apart for me the sum of three hundred thousand (300,000) dollars, and hold, manage and invest said sum for me during my lifetime and pay to me from time to time upon my written orders the whole or any part thereof, and if I shall die before my said trustees receive the property hereby transferred to them then I direct that they distribute said sum in accordance with the directions contained in my last will, and if I shall be living at the time when they receive said sum then I direct that at my death they distribute the balance remaining in their hands in accordance with the directions which may be contained in my last will; and if I am not living at the time when they receive said sum and fail to make provision by will for its distribution then I direct that they set said sum apart and hold, manage and invest it for my wife, Matilda Adelaide Jackson, if she survives me, and that they pay over to her during her lifetime upon her written order such sums as she may from time to time direct, and, at her death distribute the balance then remaining in their hands in accordance with the directions contained in her last will, and if my said wife does not survive me and I fail to make a will or make provision therein for the distribution of said balance, or if my said wife surviving me does not leave a will or make provision therein for the distribution of the balance remaining at the time of [fol. 30] her death, then I direct that the balance remaining at my death or at my wife's death, as the case may be, be distributed by said trustees in accordance with the provisions of the statutes of the Commonwealth of Massachusetts which apply in the event of intestacy.

3. Pay over to—

(a) The Boston Young Men's Christian Association in said Boston the sum of twenty thousand (20,000) dollars,

to be known as the Henry Clay Jackson Fund, the income thereof to be expended for the general purposes of said corporation.

(b) To the Massachusetts Society for the Prevention of Cruelty to Animals in said Boston the sum of five thousand (5000) dollars to be known as the Henry Clay Jackson Fund, the income thereof to be expended for the general purposes of the Society.

(c) To the Home for Aged Men on West Springfield Street in said Boston the sum of ten thousand (10,000) dollars, to be known as the Henry Clay Jackson Fund, the income thereof to be expended for its general purposes.

(d) To the Brockton City Hospital so called, in the City of Brockton in said Commonwealth, the sum of twenty-five thousand (25,000) dollars, to be known as the Henry Clay Jackson and Paul Wilde Jackson Fund, the income thereof to be expended by it for its general purposes.

(e) To the Brockton Young Men's Christian Association in said City of Brockton the sum of ten thousand (10,000) dollars to be known as the Henry Clay Jackson and Paul Wilde Jackson Fund, the income thereof to be expended by it for its general purposes.

(f) To the Free Hospital for Women in Brookline the sum of ten thousand (10,000) dollars, to be known as the Henry Clay Jackson and Paul Wilde Jackson Fund, the income thereof to be expended by it for its general purposes.

4. Pay over to the following persons who are relatives of our deceased mother, Lucy Wilde Jackson, the following sums free and discharged from all trusts, to wit—

(a) To Avis Ann Thayer the sum of two thousand (2000) dollars.

(b) To Elmer Thayer the sum of two thousand (2000) dollars.

[fol. 31] (c) To Susan Ellen Carlton the sum of two thousand (2000) dolllars.

(d) To George Tenney Wilde the sum of one thousand (1000) dollars.

5. In case Selina Henrietta Butler for many years in the employ of my said brother, agrees to and does accept the

gift made to her in this paragraph as being in full payment and satisfaction of all claims against his estate and against the administrators thereof, then I direct said trustees to pay to her the sum of fifty thousand (50,000) dollars outright, that is, free and discharged of all trusts, as soon as they receive sufficient moneys to enable them so to do, and in addition thereto I direct them to pay to her during her lifetime the sum of thirty-six hundred (3600) dollars per annum.

And if the said Selina Henrietta Butler accepts the provisions of the preceding paragraph then I direct said trustees to pay to her sister Alice Eliza Butler the sum of fifteen hundred (1500) dollars per annum during her lifetime; and also in said event to pay to their sister, Harriet Elizabeth Butler, now of Croston, near Preston, England, the sum of fifteen hundred (1500) dollars per annum during her lifetime. Neither of these last two named gifts are to take effect unless the said Selina Henrietta Butler accepts the provisions herein made for her. Said annuities to be paid in monthly instalments if the annuitants or either of them so request.

6. To pay to Edgar Jason Ames, who for many years drove and had charge of my brother's horses, the sum of twenty-five (25) dollars per week during his lifetime, payments to be made to him each week.

7. To pay to the children of the brother of the deceased wife of the said Henry Clay Jackson, during their lifetimes, to wit—

(a) To Alice C. Moulton of Newburyport in said Commonwealth, the sum of two thousand (2000) dollars per annum during her lifetime.

(b) To Mrs. Claribel Waterman of said Newburyport the sum of one thousand (1000) dollars per annum during her lifetime.

(c) To Mrs. Mary Smith, the wife of Dr. C. Morton Smith [fol. 32] of said Boston, the sum of one thousand (1000) dollars per annum during her lifetime.

(d) To Mrs. Annie Marston of Cliftondale in said Commonwealth the sum of one thousand (1000) dollars per annum during her lifetime.

8. Pay to Henry W. Kendall, the one-time partner of my deceased brother, during his lifetime, and thereafter to his wife, Mary Josephine Kendall, if she survives him, the sum of two thousand (2000) dollars per annum during her lifetime.

9. Pay to me during my lifetime, and thereafter to my wife, Matilda Adelaide Jackson, during her lifetime, the sum of ten thousand (10,000) dollars per annum, said sum to be net to me or to my said wife, all income and other taxes thereon to be paid by said trustees.

10. Pay to my daughter, Edith Adelaide Holbrook the sum of ten thousand (10,000) dollars per annum during her lifetime, and if her husband, Irvin N. Holbrook survives her, and if my said daughter so directs by her last will then to pay the whole or any part of said sum to her said husband during his lifetime, any taxes which may be assessed upon the amount to be paid to my said daughter or to her husband to be paid by said trustees.

11. To pay over to and hold and invest for my son Frederick Henry Jackson during his lifetime, and after his death to and for his present wife, if she survives him, during her lifetime, but only so long as she may remain unmarried, the sum of ten thousand (10,000) dollars per annum, in the following manner: For a period of five years I direct that there be paid to him or to her if she survives him, the sum of three hundred (300) dollars per month, and thereafter for five years more the sum of six hundred (600) dollars per month, and that the balance of said sum of ten thousand (10,000) dollars per annum remaining after said payments have been made in any year by the said trustees to be held and invested by them for the benefit of my said son or his said wife. After the expiration of the period of ten years I authorize said trustees in their discretion to pay over to him or to his said wife the sum of ten thousand (10,000) dollars in each year, and also the whole or any [fol. 33] part of the sum which they have accumulated in the foregoing manner, and if at the time of the death of the survivor of them said trustees shall hold any sum derived from said annual payments and their accumulations then I direct that said sum be paid to my grandson Paul Frederick Jackson, or if he is not living then to his children; but no portion of any of the sums to be paid to my said son, to his

wife, or to their son is to be capable of anticipation or alienation by any of them, and if any attempt is made to anticipate or alienate it then the entire remaining gift to the person who attempts such alienation is to be forfeited and is to become a part of the fund to be devoted by said trustees to charities as hereinafter set forth; any taxes upon the annuities herein provided for to be paid by said trustees.

12. To set apart for my grandson, Paul Frederick Jackson the sum of five thousand (5000) dollars, to hold the same in trust for him for a period of ten years, to add from time to time to the principal, the net income derived therefrom, and at the expiration of said period to pay over the whole amount then in the hands of said trustees to my said grandson. No part of said gift is to be capable of anticipation or alienation by him, and the whole sum held by my said trustees at the expiration of said period of ten years is to be added by them to the fund which they are to distribute among charities if my said grandson shall have attempted to transfer his interest therein.

13. I authorize my said trustees to pay to charities as hereinafter described such sums as in their judgment may be paid without jeopardizing the annuities herein provided for, whenever for a period of one year the trust fund held by them as then invested shall have yielded a net income equal to twice the amount of the annuities which they are then required to pay, and upon the death of the survivor of those persons, who under the terms of this instrument are to receive annual incomes under the trust hereby created, I direct my said trustees to distribute the rest and residue remaining in their hands among corporations and trustees organized, operating and holding exclusively for religious, charitable, scientific, literary or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, the sum paid over by said [fol. 34] trustees to such corporations or boards of trustees to be held by such corporations and boards of trustees in trust, and the income thereof to be expended for the general purposes for which such corporations and boards of trustees are organized, and I request that said funds be designated by each corporation or board of trustees as the Henry Clay Jackson Fund.

14. I direct the trustees herein named to confine their selection of charities to those organized and administered by Protestants upon non-sectarian lines, not intending hereby to exclude a charity which has upon its board of management persons of other religious beliefs, but meaning and intending to exclude any charity controlled by persons of any race or religion which is non-Protestant and which is designed in the main to serve non-Protestants.

I further direct that in selecting they give the preference to colleges for women, to homes for aged persons, and to hospitals for deformed and crippled children, the amount to be given to each to be determined by said trustees, but in accordance with the wish of my said brother I direct that they give to a considerable number of charities and that they endeavor to select such as will be likely to conserve the property given to them and to make the income thereof benefit a large number of persons.

I direct that in making their selection they procure such advice as they may deem desirable, and that in the case of payments during my lifetime or that of my wife and daughtre herein named they confer with me or with my said wife and daughter before making a gift to a charity, but subject to the directions hereinbefore set forth I give to them the final decision as to what corporations and boards of trustees shall receive the rest, residue and remainder of the property transferred to them.

I authorize the trustees hereunder in case they shall deem it wise so to do to organize new charities, to endow them, and to erect buildings for their use. I also authorize them if in their judgment it is wise so to do to erect buildings for existing colleges and educational institutions, for homes for aged persons, or for hospitals for deformed and crippled children.

15. I authorize my said trustees to sell, invest and rein- [fol. 35] vest any of the property or securities which they may receive from the administrators of said estate, no purchaser to be responsible for the application of the purchase price. I agree to execute any and all instruments that may be required hereafter in order to enable said trustees to receive the property hereby transferred to them.

16. I direct my said trustees to make the annual payments herein provided for at regular intervals, i. e., quarterly or semi-annually in each year except as otherwise provided.

17. I direct my said trustees to do any and all acts necessary in order to carry out the provisions and intent of this trust, and to incur such expense as may be necessary and proper in so doing, and to pay over to themselves regularly during the life of this trust, and at its termination such sums as are reasonable and fair compensation for services rendered by them as trustees.

In witness whereof I hereunto set my hand and seal this nineteenth day of July, 1922.

Paul Wilde Jackson (Seal). In the presence of Roberta S. Roper. Read back by DH, FMC. Assembled by VW.

7/11/33.

We hereby guarantee that the foregoing is a true and correct copy of the original instrument, duly executed, which is in our possession and under our control, and is still in full force and effect.

Old Colony Trust Company, by H. B. Driver, Trust Officer.

EXHIBIT "B" TO STIPULATION

Abstract of Tax Return of Txpayer on Form 1041 for Year 1931

Item.		Income	
2	Interest on Bank Deposits, Notes, etc	$33,189.46	
3	Interest on Tax-free Covenant Bonds upon which a tax was paid at source	24,290.00	
[fol. 36]			
6	Profit from Sale of Real Estate, Stocks, bonds, etc	48,231.82	
7	Dividends on Stock of Domestic Corporations	53,583.53	
	Total		$159,294.81
		Deductions	
11	Taxes Paid	691.79	
15	Other Deductions Authorized by Law	6,933.63	
	Total Deductions		7,625.42
	Net Income		$151,669.39

EXHIBIT "B" TO STIPULATION—Continued

Beneficiaries' Shares of Income and Credits

	Name and Address of Each Beneficiary	Percentage of Beneficial Interest	Dividends	Balance of Net Income	Income Tax Paid at Source
(a)	Mrs. Selina H. Atkinson, Lancashire, Eng	3.29999	$1,768.25	$1,645.18	$16.03
(b)	Frederick H. Jackson	6.59996	3,536.49	3,290.35	32.06
(c)	Miss Alice E. Butler	1.37499	736.77	685.50	6.68
(d)	Miss Harriet E. Butler	1.37499	736.77	685.50	6.68
(e)	Mrs. Mary Smith	.91666	491.18	456.99	4.45
(f)	Edgar Jason Ames	1.19166	638.53	594.09	5.79
(g)	Mrs. Claribel M. Waterman	.91666	491.18	456.99	4.45
(h)	Mrs. Mary J. Kendall	1.83332	982.36	913.98	8.91
(i)	Mrs. Annie Marston	.91666	491.18	456.99	4.45
(j)	Old Colony Tr. Co., Tr. for Charities	79.00846	42,335.52	39,388.89	383.83
(k)	Principal of Tr. T-1031B	2.56665	1,375.30	1,279.58	12.47
(l)	Principal of Tr. Gains	.....	.....	48,231.82	.....
(m)	Totals	.....	$53,583.53	$98,085.86	$485.80

Nontaxable Obligations, etc.

(a) Obligations of a State, Territory, or any political subdivisions thereof, etc $5,653.93

Schedule C—Profit from Sale of Real Estate, Stocks, Bonds, etc.

	Date Acquired	Amount Realized	Cost or Value as of March 1, 1913, etc.	Net Profit
Securities	Various	$343,278.82	$295,047.00	$48,231.82

[fol. 37] EXHIBIT "C" TO STIPULATION

[Figures in italics were in red in original]

Abstract of Tax Return of Taxpayer on Form 1040 for Year 1931

Income

Item.			
6	Income from Fiduciaries—Old Colony Trust Co., Trustee, 17 Court Street, Boston, Mass. T-1031	$39,388.89	
8	Profit from Sales of Real Estate, Stocks, Bonds, etc.	*1,409.25*	
10	Dividends on Stock of Domestic Corporations		42,335.52
	Total Income		$80,315.16

Deductions

18 Other deductions authorized by law	80,315.16	
Total deductions		80,315.16
Net income		None

Computation of Tax

Item	
33. Net Income	$ None
34. Liberty Bond Interest	$ None
35. Dividends	42,335.52
36. Credit for Dependents	None
37. Personal Exemption	1,500.00
38. Total of Items 34 to 73	43,835.52
39. Balance (Item 33 minus 38)	$ None
49. Tax on Capital Gain or Loss	$ None
53. Less Income Tax paid at source	$383.83

Schedule C—Profit from Sale of Real Estate, Stocks, Bonds, etc.

Kind of Property	Date Acquired	Amount Realized	Cost or Value as of March 1, 1913, etc.	Net Profit
Securities	Various	$28,990.50	$30,408.75	*$1,409.25*

[fol. 38] Schedule D—Capital Net Gain or Loss from sale of Assets Held More Than Two Years

Kind of Property	Date Acquired	Date Sold	Amount Realized	Cost or Value as of March 1, 1913, etc.	Net Gain or Loss
Securities	Various	Various	$314,279.32	$264,638.25	$49,641.07

Set Aside for Charitable & Educational Purposes

Schedule E—Interest on Liberty Bonds and Other Obligations, etc.

(a) Obligations of a State, Territory, or any political subdivision thereof, etc.	$ 4,467.11

Schedule F

Set aside for Charitable & Educational Purposes $80,315.16

EXHIBIT "D" TO STIPULATION

Trust u/d Paul Wilde Jackson (1041)

Old Colony Trust Company, Trustee (T-1031)

EXHIBIT B

Summary of Income Account for the Year 1931 as Disclosed by Cash Records of Trust

1/1/31 Balance of cash per records			193,779.43
Deduct:			
Interest coupons due in 1931 which were collected in 1930			5,780.00
Balance representing accumulated income on hand Jan. 1, 1931			187,999.43
Add:			
Taxable income exclusive of profits reported on Form 1041 for the year 1931			
Item 2		$33,189.46	
Item 3		24,290.00	
Item 7		53,583.53	
Total		111,062.99	
[fol. 39] Less:			
Item 11	691.79		
Item 15	6,933.63	7,625.42	103,437.57
Interest on municipal bonds collected			2,237.50
Coupons due in 1931 collected in 1932			5,630.00
Cash received 5/14/31 in final distribution of Estate of Henry C. Jackson, representing income collected by estate in 1930			3,112.29
Total forward			$302,416.79

Deduct:			
Cash payments out of income 1/1/31–12/31/31:			
Edgar J. Jason Ames		$1,300.00	
Alice E. Butler		1,375.00	
Harriet E. Butler		1,375.00	
Selina J. Atkinson		3,300.00	
Frederick H. Jackson		7,200.00	
Trust for benefit of Frederick H. Jackson		2,800.00	
Mary J. A. Kendall		2,000.00	
Annie Marston		1,000.00	
Mary Smith		1,000.00	
Claribel M. Waterman		1,000.00	$22,350.00
Amortization on bonds transferred to principal			456.55
Collector of Internal Revenue			0.69
Accrued interest paid on coupons due in 1932			55.56
*Paid to Charities:			
8/12/31	House of the Good Samaritan	25,000.00	
9/ 3/31	House of the Good Samaritan	25,000.00	
11/ 9/31	House of the Good Samaritan	25,000.00	
9/12/31	Boston Floating Hospital	30,000.00	
12/16/31	Boston Provident Ass'n	20,000.00	
12/16/31	Family Welfare Society	50,000.00	
12/16/31	Morgan Memorial	10,000.00	
12/16/31	Industrial Aid Society	5,000.00	
			212,862.80
1/1/32	Balance of cash on hand		$89,553.99

*Total amount paid to charities $190,000.00

[fol. 40] EXHIBIT "E" TO STIPULATION

Old Colony Trust Company,

Boston, Massachusetts

January 30, 1931.

Alan Cunningham, President Board of Managers House of the Good Samaritan, 100 Arlington Street, Boston.

MY DEAR MR. CUNNINGHAM:

In the exercise of the discretion given it under Deed of Trust dated July 19, 1922, betwen Paul Wilde Jackson and Old Colony Trust Company, the Trust Company is prepared to pay to the House of the Good Samaritan the amount necessary to make the addition to its hospital—not, however, in excess of seventy-five thousand dollars ($75,000)—as set forth in your letter of January 22, 1931, upon receiving proper assurance of the cost involved.

Under the terms of the Trust, we have been advised by counsel that we properly may make payments to charitable corporations not only for the purpose of establishing funds the income of which shall be used for the purposes of the corporation, but that under a broader interpretation we may make such payments to be used by such corporations as capital expenditures, that is, to erect or furnish buildings or parts thereof or to make other permanent additions and improvements to the properties so that the organizations shall have the use of such additions and improvements.

Before making the payment, we request that your Board having authority pass a vote accepting the amount indicated above, to be used for the particular purpose of this addition to your building.

By the terms of the Deed of Trust it is requested that funds "be designated by each corporation or board of trustees as the Henry Clay Jackson Fund". We understand that it will be agreeable to you to mark the new addition with some appropriate inscription, and suggest that at the proper time we agree upon the exact form and wording of such inscription.

Yours very truly, C. B. Humphrey, Vice President.

[fol. 41] File Envelope T1031

Received 11/6/29.

Voted: That in exercise of the discretion given Old Colony Trust Company as Trustee under Deed of Trust executed by Paul Wilde Jackson, dated July 19, 1922 the company's officers are hereby authorized to pay over to or for the benefit of the Boston Floating Hospital a sum not in excess of two hundred thousand dollars ($200,000) upon receiving the undertaking of the Trustees of said hospital to apply the same to the erection of a building for the use of the hospital substantially in accordance with the published plans for the proposed new New England Medical Center. In making such payment arrangement shall be made that the building shall be designated as a memorial to Henry Clay Jackson or that, otherwise, it shall be identified with his name and that of his brother Paul Wilde Jackson.

[fol. 42]

Paul Wilde Jackson Trust Fund

Plan for Distribution of $60,000 Excess Income

Organization	Annual Beneficiaries (approximate)	Payment from Jackson Fund			Purpose
Children's Hospital 300 Longwood Avenue, Boston.	5,000 (plus outside treatments)	$25,000.	P	6-23-25	
New England Peabody Home for Crippled Children, Oak Hill, Newton, Mass.	85	3,000.	P	6-27-25	
Industrial School for Crippled and Deformed Children, 241 St. Botolph St., Boston	114	2,000.	Pd.	6- 9-25	
Boston Home for Incurables, 2049 Dorchester Ave., Dorchester, Mass.	40-50	2,000.	Pd.	7-15-25	
Burnap Free Home for Aged Women, 38 Pleasant Street, Dorchester, Mass.	18	1,000.	Pd.	12-23-25	
Cambridge Homes for Aged People, 360 Mt. Auburn St., Cambridge, Mass.	51	3,000.	Pd.	6-11-25	
Home for Aged Men, 133 W. Springfield St., Boston.	86	3,000.	P	7-10-25	Outside aid
Home for Aged Women, 108 Revere Street, Boston.	85	3,000.	Pd.	11- 6-25	
Home for Aged Couples, Columbus & Walnut Avenues, Roxbury.	76	3,000.	P	8-14-25	
[fol. 43]					
Community Health Association 31 St. James Avenue, Boston.		5,000.	P	6-13-25	
Morgan Memorial Co-operative Industries and Stores, Inc., 89 Shawmut Ave., Boston.	1783 (Outside 1800)	5,000.	P	6-22-25	
Salvation Army of Massachusetts, Inc., 8 East Brookline St., Boston.	244,000 (Outside 66,000)	5,000.	Pd.	6- 9-25	
		$60,000			

Approved Apr. 16, 1925.

Paul W. Jackson,
C. B. Humphrey.

[fol. 44] Plan for Distribution of $109,000 Excess Income

Organization	Payment from Jackson Fund	
Home for Aged Men, 133 West Springfield Street, Boston, Mass.	$37,000. This to be added to the sum of $3,000. paid in 1925, the whole creating a fund of $40,000, of which Income only is to be used for outside aid.	Pd. 6-22-26
Home for Aged Women, 108 Revere Street, Boston, Mass.	$37,000. This to be added to the sum of $3,000. paid in 1925, the whole creating a fund of $40,000, of which Income only is to be used for outside aid.	Pd. 7-1-26
Boston Y. W. (Women's) C. A., 37½ Beacon Street, Boston, Mass.	$35,000. The same to create a Trust Fund to be known as the Henry Clay Jackson Memorial Educational Fund, of which the Income only shall be used for expenses of the Educational Department of the association.	Pd. 6-24-26

Approved: June 11, 1926.
Paul Wilde Jackson,
Old Colony Trust Company,
By C. B. Humphrey.

[fol. 45].

Income Available June 2, 1927 $119,000

Organization	Amount Appropriated	Amount and Date Paid
	None	None

Income Available June 2, 1928 $214,000

Organization	Amount Appropriated	Amount and Date Paid
Children's Hospital 300 Longwood Avenue, Boston	$100,000.00 This is for the purpose of an addition to the Out-Patient and Admissions Department to be marked with an appropriate memorial tablet as the gift of the Henry Clay Jackson Fund.	$100,000.00 Dec. 31, 1928

Approved Dec. 31, 1931

Committee (Gordon Abbott,
(C. B. Humphrey,
(Francis R. Hart.

Note.—Approved on the date indicated to ratify and confirm approval made at an earlier date but not recorded.

[fol. 46]

Income Available June 2, 1929, $201,000

Organization	Amount Appropriated	Amount and Date Paid	
The Boston Floating Hospital 244 Washington Street, Boston, Mass.	A sum not in excess of $200,000 to be applied to the erection of a building for the use of the hospital substantially in accordance with the published plans for the proposed new New England Medical Center; the building to be designated as a memorial to Henry Clay Jackson or to be identified with his name and that of his brother, Paul Wilde Jackson.	$150,000 30,000 17,242.21	November 13, 1930 Sept. 12, 1931 Jan. 20, 1932

Approved, Dec. 31, 1931.

Committee (Gordon Abbott,
(C. B. Humphrey,
(Francis R. Hart.

Note.—Approved on the date indicated to ratify and confirm approval made at an earlier date but not recorded.

[fol. 47]

Income Available June 2, 1931, $180,000

Net after allowing 50M bal. appr. to Bos. Floating Hosp.

Organization	Amount Appropriated	Amount and Date Paid	
House of the Good Samaritan Cor. Francis & Binney Sts. Boston, Mass.	A sum not in excess of $75,000. to make an addition to its hospital with appropriate inscription (approved Jan. 30, 1931)	$25,000. 25,000. 25,000.	August 12, 1931 Sept. 3, 1931 Nov. 9, 1931
Industrial Aid Society 35 Chardon Street Boston, Massachusetts.	$5,000. to establish a permanent fund to be known as Henry Clay Jackson Fund income only to be used for general purposes.	5,000.	Dec. 16, 1931
Family Welfare Society of Boston 41 Hawkins Street Boston, Mass.	$50,000. to establish a permanent fund to be known as Henry Clay Jackson Fund income only to be used for general purposes	50,000.	Dec. 16, 1931
Boston Provident Association 41 Hawkins Street Boston, Mass.	$20,000. to establish a permanent fund to be known as Henry Clay Jackson Fund income only to be used for general purposes	20,000.	Dec. 16, 1931
The Morgan Memorial Cooperative Industries & Stores, Inc. 89 Shawmut Avenue, Boston, Mass.	$10,000. to establish a permanent fund to be known as Henry Clay Jackson Fund income only to be used for general purposes	10,000.	Dec. 16, 1931
[fol. 48] Salvation Army 8 E. Brookline Street Boston, Mass.	$20,000. to establish a permanent fund to be known as Henry Clay Jackson Fund income only to be used for general purposes	20,000.	Jan. 20, 1932.

Approved Dec. 31, 1931

Committee (Gordon Abbott,
(C. B. Humphrey,
(Francis R. Hart.

Income Available December 31, 1932—$113,000

Organization	Amount Appropriated	Amount and Date Paid
The Children's Hospital, 300 Longwood Avenue, Boston, Mass.	$10,000 to be added to permanent fund known as Henry Clay Jackson Fund, income only to be used for general purposes	$10,000.—May 10, 1933
Community Health Association 31 St. James Avenue Boston, Massachusetts	$20,000 to be added to permanent fund known as Henry Clay Jackson Fund, income only to be used for general purposes	$20,000.—May 10, 1933
Family Welfare Society of Boston 41 Hawkins Street Boston, Massachusetts	$40,000 to be added to permanent fund known as Henry Clay Jackson Fund, income only to be used for general purposes	$40,000.—May 10, 1933
[fol. 49] New England Home for Little Wanderers 161 South Huntington Avenue Roxbury, Massachusetts	$15,000 to establish a permanent fund to be known as Henry Clay Jackson Fund, income only to be used for general purposes	$15,000.—May 10, 1933
The Convalescent Home of the Children's Hospital Wellesley, Massachusetts	$15,000 to establish a permanent fund to be known as Henry Clay Jackson Fund, income only to be used for general purposes	$15,000.—May 10, 1933
Massachusetts Society for the Prevention of Cruelty to Children 43 Mount Vernon Street Boston, Massachusetts	$10,000 to establish a permanent fund to be known as Henry Clay Jackson Fund, income only to be used for general purposes	$10,000.—May 10, 1933

Approved May 6th, 1933

Committee (Francis R. Hart,
(Gordon Abbott,
(G. B. Humphrey.

Income Available December 28, 1933—$60,000

Organization	Amount Appropriated	Amount and Date Paid
Peter Bent Brigham Hospital 721 Huntington Avenue Boston, Massachusetts	$530,000 to establish a permanent fund to be known as Henry Clay Jackson Fund, income only to be used for general purposes	$30,000. Dec. 29, 1933
[fol. 50] Massachusetts General Hospital Fruit Street Boston, Massachusetts	$30,000 to establish a permanent fund to be known as Henry Clay Jackson Fund, income only to be used for general purposes	$30,000 Dec. 29, 1933

Approved December 28, 1933.

(Gordon Abbott,
Committee (Francis R. Hart,
(C. B. Humphrey.

fol. 51] EXHIBIT "F" TO STIPULATION

Arthur T. Johnson Counsellor at Law,

Barristers Hall, Pemberton Square, Boston, Mass.

May 14, 1925.

Old Colony Trust Company, 17 Court Street, Boston, Mass.

DEAR SIRS:

In connection with the Deed of Trust created by Paul Wilde Jackson I am of the opinion—

First. That the authority given the Trustees to make payments to charities whenever the net income is equal to twice the amount of the annuities permits them to make payments not only of income but of principal from time to time in the exercise of their judgment.

Second. That the Trustees not only may make payments to charitable corporations for the purpose of establishing funds to be invested in securities and the income used for the purposes of the Corporation, but that, under a broader interpretation, they properly may make such payments to be used by such corporations as capital expenditures, that is, to erect or furnish buildings or parts thereof or to make other permanent additions and improvements to the properties of charitable organizations so that the organizations shall have the use of such additions and improvements. For example: In my opinion your proposed gifts to the Salvation Army for the erection of two dormitories at its fresh air camp in Sharon and to the Home for Aged Couples for the purpose of constructing and equipping with permanent apparatus a hospital room, are within your proper powers under the Trust Deed.

This opinion is elaborated in the memorandum attached, which also contains facts concerning the drafting and execution of the Trust Deed which you may wish to have in your files for reference.

Yours very truly, Arthur T. Johnson.

[fol. 52] Arthur T. Johnson Counsellor at Law

Barristers Hall, Pemberton Square, Boston, Mass.

May 14, 1925.

Old Colony Trust Company, 17 Court Street, Boston, Mass.

Dear Sirs:

I have given consideration to the matters which I discussed recently with Mr. Humphrey, and in accordance with his request submit herewith an opinion relating thereto.

When Henry C. Jackson first talked with me about the matter of a will, he told me that except for certain gifts of lump sums and annuities which are not material to the question now under consideration, he wished to leave all of his property to charities, but he had not come to any conclusion as to particular charities except that he had decided to give various relatively unimportant sums to some or all of the charities which are named in the third clause of the Paul Wilde Jackson Trust. I have several times stated to you that he told me at this conversation that he was particularly interested in colleges for women, that he would like to have founded a college similar to the one which Mr. Simmons founded. He stated "• • • Simmons got ahead of me on this. I would like to have founded a college for young women. He stated that in addition to colleges for women, he was particularly interested in hospitals for children and homes for aged persons. He said that this was as far as he had gotten in working out his plans and that he realized his trustees would have to take it up from this point and carry it forward if he did not live to do it himself.

There was a discussion also of the matter of estate and inheritance taxes, and particularly of federal taxes, and the language in the thirteenth paragraph of the Paul Wilde Jackson Trust—"among corporations and trustees organized, operating and holding exclusively for religious, charitable, scientific, literary or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals"—is practically that of the United States Estate Tax law, (Acts 1921, section 403 B-3). That is, the objects of his charity were described in accordance with the description in the Federal statute, so that there might be no question about the exemption. Congress in en-

[fol. 53] acting this statute meant to exempt any gift to a real charity, and defined charity in the broadest way, and this language was deliberately adopted by me in drafting the will and transferred from the will to the trust.

It seems to me that it is important to have this fact in mind in analyzing clauses 13, 14, etc. and that in considering your powers and duties under them, there are two basic propositions, first, that your trust is an active one, that it calls for construction of a scheme of distribution; the exercise of choice, the selection of charities; and second, that the field from which selection is to be made is as broad as that defined by Congress when it enacted the Estate Tax law.

The word "trustees" following the word "corporation", which does not appear in the federal statute, was introduced by me because I had the feeling that there might be cases where funds were held not by corporations, but by natural persons as trustees.

With this preliminary statement, we come to an analysis of the trust, more particularly clauses 13 and 14.

Mr. Jackson recognized that the annuities, being to natural persons, would cease one by one, and that it would be possible, without jeopardizing the interests of the last survivors, to begin to make payments to charities from principal as well as income before the time arrives for final distribution. He fixed the time and conditions under which the trustees were to have power to do so, i. e., it should be "whenever for a period of one year the trust fund shall have yielded a net income equal to twice the amount of the annuities which they are then required to pay". The first part of clause 13 deals with this matter. By it, the trustees are authorized, that is, empowered, given legal sanction "to pay to charities as hereinafter described", i. e., as described in the language above quoted—"such sums as in their judgment may be paid without jeopardizing", etc. They are not directed to do this. It is left to their judgment whether or not they will make payments to charities before the death of the last annuitant. If they do make such gifts, they are doing it under the authority given them by this clause in anticipation of final distribution, and they are to distribute them in the same manner that the trust requires them to when the time for final distribution arrives.

[fol. 54] In my opinion this part of clause 13 merely gives authority to begin distribution before the time fixed for final

two are not dependent one on the other, and one does not limit the other. The next sentence authorizes the trustees to erect buildings for existing colleges, for homes for the aged, for hospitals for children. Under the first sentence of this paragraph, as above stated, the trustees may build, organize, and endow a new college and by the second sentence power is given to erect a dormitory for instance, for an existing college or a building for an existing hospital. If the Trustee wished to organize an entirely new college, for instance, it would act under the first sentence. If it wished to benefit an existing college, it would act under the second sentence.

I trust that the above covers the ground concerning which you desired my opinion.

Yours very truly, Arthur T. Johnson.

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 74928

OLD COLONY TRUST COMPANY, Trustee under an Indenture of Trust of Paul Wilde Jackson, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Promulgated October 29, 1935

1. A trustee may not deduct, under section 162 (b) Revenue Act of 1928, amounts paid to annuitants in the taxable year pursuant to a deed of trust by the terms of which the annuities are charges upon both the income and the corpus at any time when payment of them becomes due.

2. Income, consisting of gains from sales of securities, which is added to the corpus, is not permanently set aside for charitable, etc., purposes, within the meaning of section 162 (a), Revenue Act of 1928, where not only the income but the corpus of the trust remaining at any time may be used to pay annuities.

[fol. 57] 3. Where the trustees have on hand at the beginning of the year income accumulated in prior years and also receive income during the taxable year, amounts actually

paid by them to charities pursuant to the terms of the deed of trust may be deducted, in computing the net income of the trust, only to the extent that they are shown by the evidence to have been paid from the gross income of the taxable year.

F. V. Barstow, Esq., for the petitioner.
Hartford Allen, Esq., for the respondent.

OPINION

MURDOCK:

The Commissioner determined a deficiency of $21,589.91 in income tax of the petitioner for the calendar year 1931. The petitioner assigns as error the action of the Commissioner in including as taxable income for 1931, (1) "amounts of income paid to annuitants in the year 1931 pursuant to the said Deed of Trust", and (2) "amounts of income, including gains from the sale of securities, that pursuant to the terms of the Deed of Trust have, in accordance with the provisions of the Revenue Act of 1928, section 162 (a), been paid or permanently set aside for the purposes and in the manner specified in section 23 (n) of the said Act or have been used exclusively for religious, charitable, or educational purposes or for the prevention of cruelty to children."

The facts were stipulated and need not be set forth in full detail.

The petitioner is the surviving trustee of a trust established by Paul Wilde Jackson by a deed dated July 19, 1922. The trust was created for the purpose of carrying out some wishes of the grantor's brother, who died intestate, leaving the grantor as his sole heir. The trust deed placed the property received from the brother in trust and provided for the distribution of a part of it in ways not now material. It then directed the trustees to pay the following amounts to the following persons for life:

Selina Henrietta Butler (for many years an employee of the brother)	$3,600 per annum
Alice Eliza Butler (sister of Selina)	1,000 " "
Harriet Elizabeth Butler (sister of Selina)	1,500 " "
[fol. 58] Edgar Jason Ames (for many years coachman for the brother)	25 per week

Alice C. Moulton (child of a brother-in-law of the brother)	1,000	per annum
Claribel M. Waterman (child of a brother-in-law of the brother)	1,000	" "
Mary Smith (child of a brother-in-law of the brother)	1,000	" "
Annie Marston (child of a brother-in-law of the brother)	1,000	" "
Henry W. Kendall (one-time partner of deceased brother) and after his death to his wife, Mary Josephine Kendall	2,000	" "
Paul Wilde Jackson (the grantor) and after his death to his wife, Matilda Adelaide Jackson	10,000	" "
Edith Adelaide Holbrook (daughter of grantor) and, if she so directs, after her death to her husband, Irvin N. Holbrook	10,000	" "
Frederick Henry Jackson (son of grantor) and after his death to his wife, while she remains unmarried	10,000	" "

It also provided that the trustees were to "set apart" $5000 for a grandson of the grantor and pay it over with accumulations at the end of ten years.

Paragraph 13 of the deed of trust is as follows:

I authorize my said trustees to pay to charities as hereinafter described such sums as in their judgment may be paid without jeopardizing the annuities herein provided for, whenever for a period of one year the trust fund held by them as then invested shall have yielded a net income equal to twice the amount of the annuities which they are then required to pay, and upon the death of the survivor of those persons, who under the terms of this instrument are to receive annual incomes under the trust hereby created, I direct my said trustees to distribute the rest and residue [fol. 59] remaining in their hands among corporations and trustees organized, operating and holding exclusively for religious, charitable, scientific, literary or educational purposes including the encouragement of art and the prevention of cruelty to children or animals, the sum paid over by said trustees to such corporations or boards of trustees to

be held by such corporations and boards of trustees in trust, and the income thereof to be expended for the general purposes for which such corporations and boards of trustees are organized, and I request that said funds be designated by each corporation or board of trustees as the Henry Clay Jackson Fund.

The trustees were also authorized to organize new charities and to build buildings for charities, if they deemed it wise to do so.

The first receipt of principal by the taxpayer under the trust was on May 29, 1923, and upon that date separate ledger sheets for the principal, and for the income (exclusive of profits from sales of corpus) of the trust were opened. The first receipt of income was on June 30, 1923. The principal (corpus) account has always been maintained separate and apart from the income account. No annuity payments or payments to charitable organizations have been charged on the books to the principal account, which account includes accumulated profits from sales of securities.

The amount of income of the trust for each year since the taxpayer has held the principal, has been more than twice the aggregate of the annuity payments required in such year by the terms of the trust and the taxpayer considered that it had power to pay to charities defined in the trust instrument such parts of the principal and income of the trust as in its judgment could be paid without jeopardizing the annuities, except that during the life of the grantor or his wife and daughter the trustee was obliged to confer with the grantor or his wife and daughter before making a gift to charity. The grantor died June 21, 1928, his wife June 30, 1928 and his daughter October 26, 1923.

The taxpayer considered that it had power to make gifts [fol. 60] from the principal and income of the trust to charities and it also has considered that all of the trust properties in excess of that part of the income which it considered necessary for the trust expenses and annuity payments belonged to charities. Since 1925 it has appropriated and/or paid certain sums to specific charities. • • •

The trustees had paid $436,242.21 to charities prior to January 1, 1931. The market value of the trust corpus was

$2,119,835.81 on January 1, 1931, and $1,488,140.43 on December 31, 1931, while the cash balance on those dates was $193,779.43 and $89,553.99, respectively. The accumulated income on hand on January 1, 1931, was $187,999.43. The amounts paid to charities during 1931 and the dates on which the payments were made were:

August 12	$25,000
September 9	25,000
September 12	30,000
November 11	25,000
December 16	85,000
Total	190,000

The $30,000 listed above was in payment of a part of the unpaid balance of an appropriation made in 1929.

The trust received income during 1931 of $60,901.82 from the sale of securities and $114,417.36 from other sources. The Commissioner determined that the net income for the year amounted to $164,339.39. The trustees paid $22,350 to annuitants during the year.

The total annuities distributed or distributable in 1931 and the ages of the annuitants were as follows:

Annuitant	Age	Annuity
Selina H. Butler	54	$3,600
Alice E. Butler	62	1,500
Edgar Jason Ames	73	1,300
Claribel M. Waterman	63	1,000
Mary Smith	65	1,000
[fol. 61] Annie Marston	74	1,000
Mary J. Kendall	85	2,000
Frederick H. Jackson	59	10,000
Harriet E. Butler	55	1,500
Total		$22,900

The cost of purchasing annuities for all of the annuitants of 1931 at their ages in that year if purchased during the first six months of 1931 from The New York Life Insurance Company would have been $200,804.33.

The taxpayer's returns were made upon a cash receipts and disbursements basis.

The petitioner filed a fiduciary return for 1931 showing income apportioned to annuitants and to itself. It also filed an individual return for the year showing total income of $80,315.16 and a deduction of a like amount "Set aside for Charitable and Educational Purposes." Capital gains of $49,641.07 were shown as "Set aside for Charitable and Educational Purposes".

The Commissioner allocated all of the taxable income to the petitioner and allowed no deductions for income distributed to annuitants or set aside for charitable and educational purposes.

The first question for decision is whether the petitioner may deduct from its gross income for tax purposes the amounts distributable to the annuitants in 1931. Section 162 (b) of the Revenue Act of 1928 provides in part as follows:

> There shall be allowed as an additional deduction in computing the net income of the estate of trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries • • • but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not. Any amount allowed as a deduction under this paragraph shall not be allowed as a deduction under subsection (c) of this section in the same or any succeeding taxable year.

[fol. 62] The deed of trust clearly discloses an intention on the part of the grantor to make the annuities charges upon both the income and corpus of the estate held by the trustees at any time when payments of annuities should become due. The annuities were "payable at all events" and did not "depend upon income from the trust estate". The annuities were, therefore, gifts and the trustees were not entitled to deduct the amounts paid to the annuitants in 1931. Helvering v. Pardee, 290 U. S. 365; Burnet v. Whitehouse, 283 U. S. 148; Boston Safe Deposit & Trust Co. v. Commissioner, 66 Fed. (2d) 179 (affirming 26 B. T. A. 486); certiorari denied, 290 U. S. 700; Bridgeport City Trust Co., Trustee, 32 B. T. A. 1181.

The other question for decision is whether the petitioner is entitled to deduct "any part of the gross income" for 1931 under section 162 (a), which is as follows:

There shall be allowed as a deduction (in lieu of the deduction for charitable, etc., contributions authorized by section 23 (n), any part of the gross income, without limitation, which pursuant to the terms of the will or deed creating the trust, is during the taxable year paid or permanently set aside for the purposes and in the manner specified in section 23 (n), or is to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, or for the establishment, acquisition, maintenance or operation of a public cemetery not operated for profit.

The petitioner contends that the gain from the sale of securities was deductible. It concedes that this particular gain was added to corpus and was not actually "paid" to anyone in 1931. But it contends that this income was "permanently set aside" during the taxable year for charitable purposes or "is to be used exclusively" for purposes mentioned in section 162 (a). The Board and the court to which this case would go upon appeal have held under somewhat similar circumstances that no deduction is allowed where such gains are merely added to the corpus of the trust in accordance with the trust instrument. Boston Safe Deposit & Trust Co. v. Commissioner, supra; Bank of America National Association, Trustee, 19 B. T. A. 1273; Charles W. Jaynes et al., [fol. 63] Trustees, 29 B. T. A. 259; Gertrude Hemler Tracy et al., Trustees, 30 B. T. A. 1156. See, contra, Hartford-Connecticut Trust Co. v. Eaton, 41 Fed. (2d) 69. This is because it can not be definitely determined during the taxable year that this part of the gross income of the trust has been permanently set aside for charitable purposes or is to be used exclusively for such purposes. As long as there is a possibility that the income may have to be used pursuant to the terms of the trust deed for purposes other than charitable ones, the deduction may not be allowed under the provisions of section 162 (a) and similar provisions of earlier acts. Here the same conclusion must be reached as was reached in the cases cited, since the grantor intended that not only this particular income, but also the corpus of the trust remaining at any given time, could be used to pay the annuities. Despite the large surplus of income over annuity payments in 1931, no funds of the trust were permanently set aside or were to be used exclusively for charitable purposes under this trust instrument, except such trust

funds as were actually paid to charities during that year. The exception does not apply to the gains from the sale of securities, since they were not paid to charities during that year.

The grantor of the trust made certain provisions to safeguard the payments to the annuitants. But he must have realized that as the annuity payments decreased some of the trust funds could be used for charitable purposes without endangering the payment of the gifts to annuitants, since the latter could be amply protected by the income and corpus of the remaining trust property. In the deed of trust he gave to the trustees authority to use funds of the trust for charitable purposes, under certain circumstances, during the lives of the annuitants. However, he did not direct them to use trust funds during that period for charitable purposes nor did he say whether they should use income or corpus in case they decided to make a gift to charity during that period. Yet it seems clear from the deed as a whole that the trustees had authority to pay the amounts to charities which they actually paid in 1931. They had authority to make such payments from any available source within the trust, i. e., they could use corpus, accumulated income, or [fol. 64] excess current earnings of 1931. Since their authority was so broad, it may be important to determine, if possible, the source from which the payments to charity were actually made.

The trustees chose to make the payments from and to charge them to income, rather than corpus. The facts as stipulated show that the trustees, in making their appropriations, did not have in mind the income of the current taxable year. They considered only the income available on June 2, 1931. That consisted principally of the accumulated income of a prior year. The accumulated income at the beginning of the year amounted to $187,999.43. They made appropriations of $180,000. They paid in 1931 $160,000 of the amount thus appropriated and $30,000 appropriated in 1929. These facts rather indicate that the trustees in 1931 really intended to distribute income theretofore accumulated rather than to distribute the current income of 1931. They charged the payments to income rather than to corpus. But the income account included both accumulated and current income. They did, of course, eliminate the gains from the sales of securities in 1931 by adding that to the corpus which

they did not intend to touch. They also allocated a part of the 1931 income to the payment of the annuities and current expenses of that year. This left about $80,000 of the gross income of 1931 unallocated. Income of prior year on hand at the beginning of the year 1931 in the amount of $187,999.43 was available for the payments to charities. The question is, How much, if any, of the gross income of 1931 was paid to the charities in 1931 and thus used for charitable purposes pursuant to the terms of the deed creating the trust within the meaning of section 162 (a)? The deduction is based upon the use of the income subject to tax and not upon the use of accumulated income of prior years.

Under some circumstances the arbitrary acts of fiduciaries have been deemed of no significance in determining whether or not a deduction is proper for the estate. Bowers v. Slocum, 20 Fed. (2d) 350; E. Sohier Welch et al., Trustees, 9 B. T. A. 1370; Hu L. McClung et al., Executors, 13 B. T. A. 335. The petition was not required to use income for payment of the gifts to charities. If the above cited cases apply the petitioner would not be entitled to any deduction merely [fol. 65] because the trustee chose to account for the payments to charities as made from income rather than from corpus. Any gifts actually paid from income of 1931 were in one sense paid pursuant to the deed of trust. The petitioner had the burden of showing the amount paid from gross income of 1931. The total payments made in 1931 exceeded the accumulated income on hand at the beginning of that year by $2,000.57. Thus the latter amount must have been paid from income of 1931. However, the petitioner has not shown that more than $2,000.57 of the $190,000 was paid from gross income of 1931, nor has it suggested any method of determining how much more of the $190,000 was paid out of gross income of 1931. Lynchburg Trust & Savings Bank et al., Trustees, 27 B. T. A. 1182 (reversed on other grounds, 68 Fed. (2d) 356). Even the impossibility of establishing the specific amount, made essential by statute as a prerequisite to the allowance of the deduction, does not justify a deduction computed arbitrarily, but leaves the taxpayer with an unenforceable claim. Burnet v. Houston, 283 U. S. 223. Here the Board has no way of determining how much of the $190,000 payments in excess of $2,000.57 might have been made from 1931 income and how much from prior accumulations. Some arbitrary allocation might be made, of course, but no sufficient justification for such proce-

dure appears. The right to a deduction must be proved and a failure of proof results in a loss of the deduction. Burnet v. Houston, supra; Reinecke v. Spalding, 280 U. S. 227, 233; United States v. Anderson, 269 U. S. 422, 443.

Reviewed by the Board.

Decision will be entered under Rule 50.

DISSENTING OPINION

SMITH, dissenting:

There appears to be no question but that the net income of the trust fund for 1931, before the deduction from the gross income of amounts paid to annuitants and amounts paid or set aside for charitable and educational purposes, was $164,339.39, as determined by the respondent. The trust paid to annuitants $22,356. The deduction of this amount was correctly disallowed by the respondent.

Section 162 (a) of the Revenue Act of 1928 permits the [fol. 66] deduction from the gross income of the trust of "any part of the gross income, without limitation, which pursuant to the terms of the will or deed creating the trust, is during the taxable year paid or permanently set aside for the purposes and in the manner specified in section 23(n)". The amount paid to charities by the trust during 1931 was $190,000 or an amount in excess of the total gross income for the year. I am of the opinion that under section 162(a) the petitioner was entitled to deduct from its gross income the full amount of $141,989.39, the difference between the net income as determined by the respondent and the amounts paid to annuitants. I can not believe that the theory invoked in the majority opinion to the effect that the trust must show from what receipts the payments to charities were made in order to have them deductible is responsive to the legislative intent. And it is the legislative intent which should control in the construction of the taxing statute.

It is further to be noted that the entire income of the trust fund was to be paid to charitable and other organizations referred to in section 23 (n) after the payment of expenses and annuities. If the trust fund is required to pay the tax determined by the Board in this case, the payment impinges upon the amount which would otherwise go to charities. In my opinion this was never contemplated by Congress and, as stated by the Supreme Court in Lederer v. Stockton, 260

U. S. 3: "To allow the technical formality of the trust, which does not prevent the Hospital from really enjoying the income, would be to defeat the beneficent purpose of Congress."

ARUNDELL, dissenting:

Beginning with the 1913 Revenue Act and down to date Congress has disclosed a progressively liberal attitude in dealing with contributions to charity. This beneficent purpose should not be defeated by a strained and technical approach. Stockton v. Lederer, 260 U. S. 3. In my opinion petitioner has clearly established its right to deduct a very large part of the sum actually paid by it to charities within the taxable year.

Trammell and Matthews agree with this dissent.

[fol. 67] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

MOTION FOR DECISION UNDER RULE 50—Filed November 29, 1935

Now comes the Commissioner of Internal Revenue, by his attorney, Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, and

Moves the Board to enter a decision redetermining the tax liability of the petitioner for the calendar year 1931, in accordance with the opinion of the Board promulgated under date of October 29, 1935, and as set forth in the statement attached hereto.

This proposed redetermination is submitted in accordance with the opinion of the Board without prejudice to the right of the petitioner or of the respondent to contest the correctness of the opinion pursuant to the statute in such cases made and provided.

Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue. Of Counsel: Hartford Allen, Special Attorney, Bureau of Internal Revenue.

No objection.

Francis V. Barstow, Counsel for Petitioner.

Statement

IT:AR:BTA-Recomp. AMK.

In re: Old Colony Trust Company, Trustee, Under Indenture of Trust of Paul Wilde Jackson, Boston, Massachusetts. BTA. No. 74928. Year 1931.

Net income, 60-day letter dated December 28, 1933:		
Ordinary net income		$102,858.07
Capital net gain		61,481.32
Total		$164,339.39
[fol. 68] Deduct:		
Contributions allowed in accordance with decision of the United States Board of Tax Appeals promulgated October 29, 1935		2,000.57
Total net income adjusted		$162,338.82
Less: Capital net gain included		61,481.32
Income subject to surtax		$100,857.50
Less: Dividends	$53,583.53	
Personal exemption	1,500.00	55,083.53
Income subject to normal tax		$45,773.97
Normal tax at 1½% on $4,000.00		60.00
Normal tax at 3% on $4,000.00		120.00
Normal tax at 5% on $37,773.97		1,888.70
Surtax on $100,857.50		11,831.50
Tax at 12½% on $61,481.32		7,685.17
Total tax		$21,585.37
Less: Income tax paid at source		495.60
Net tax liability		$21,089.77
Tax previously assessed		None
Deficiency in tax		$21,089.77

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

DECISION—Entered December 13, 1935

Pursuant to the Board's opinion promulgated October 29, 1935, the respondent filed a recomputation and notice of settlement on November 29, 1935, on which was endorsed "No objection" by counsel for the petitioner. Therefore, it is

Ordered and decided that there is a deficiency in tax for the year 1931 in the amount of $21,089.77.

J. E. Murdock, Member, United States Board of Tax Appeals.

[fol. 69] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

PETITION FOR REVIEW IN UNITED STATES CIRCUIT COURT OF APPEALS—Filed March 11, 1936

To the Honorable the Judges of the United States Circuit Court of Appeals for the First Circuit:

The petitioner above named by his attorney, Francis V. Barstow, respectfully represents as follows:

I. Jurisdiction

1. The petitioner is and at all times since a date prior to the execution of the deed of trust hereinafter mentioned has been a corporation organized under the laws of the Commonwealth of Massachusetts and a citizen and resident of said Commonwealth, having its principal place of business at 17 Court Street in Boston in said Commonwealth. In its capacity of trustee under said deed of trust it filed its ~~federal~~ income tax returns for the calendar year 1931 with the United States Collector of Internal Revenue for the District of Massachusetts at Boston, Massachusetts, whose office was and is located within the First Circuit.

2. The respondent, Guy T. Helvering, is the duly appointed, qualified and acting Commissioner of Internal

Revenue of the United States, holding his office by virtue of the laws of the United States.

3. This is a proceeding for review by the Circuit Court of Appeals for the First Circuit, pursuant to statute in such cases made and provided, of the action taken by the United States Board of Tax Appeals in its opinion promulgated October 29, 1935, and in its decision rendered pursuant to said opinion and entered December 13, 1935, redetermining that there is a deficiency in income tax due from the petitioner in its capacity of trustee under said deed of trust for the year 1931 in the sum of $21,089.77, this being (subject to a deduction of $500 upon recomputation) the sum previously determined by the Commissioner of Internal Revenue.

II. Nature of the Controversy

1. The petitioner is the surviving trustee under a deed of trust executed by Paul Wilde Jackson and dated July [fol. 70] 19, 1922. After certain provisions not now material the deed directs the trustees to pay specified annuities to various persons for their respective lives. Paragraph 13 of the deed is as follows:

"I authorize my said trustees to pay to charities as hereinafter described such sums as in their judgment may be paid without jeopardizing the annuities herein provided for, whenever for a period of one year the trust fund held by them as then invested shall have yielded a net income equal to twice the amount of the annuities which they are then required to pay, and upon the death of the survivor of those persons, who under the terms of this instrument are to receive annual incomes under the trust hereby created, I direct my said trustees to distribute the rest and residue remaining their hands among corporations and trustees organized, operating and holding exclusively for religious, charitable, scientific, literary or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, the sum paid over by said trustees to such corporations or boards of trustees to be held by such corporations and boards of trustees in trust, and the income thereof to be expended for the general purposes for which such corporations and boards of trustees are organized, and I request that said funds be designated by each corporation or board of trustees as the Henry Clay Jackson Fund."

2. The income of the trust for each year since the petitioner has held the principal has been more than twice the aggregate of the annuity payments required in such year by the terms of the trust. The petitioner has been advised that under these circumstances it has power to pay to charities defined in the trust instrument such parts of the principal and income of the trust as in its judgment can be paid without jeopardizing the annuities, except as it is provided by the deed of trust (in a paragraph subsequent to that quoted above) that the trustees, during the life of the grantor or his wife and daughter, shall confer with him or his wife and daughter before making a gift to charity. The grantor died June 21, 1928, his wife June 30, 1928, and his daughter October 26, 1923.

[fol. 71] 3. In the administration of the trust the petitioner has considered not only that it has power to make gifts from the principal and income of the trust to charities, but also that all of the trust property in excess of that part which it considers necessary for the trust expenses and annuity payment belongs to charities.

4. The first receipt of principal by the petitioner under the trust was on May 29, 1923, and upon that date separate ledger sheets for the principal and for the income (exclusive of profits from sales of corpus) of the trust were opened. The first receipt of income was on June 30, 1923. The principal (corpus) account has always been maintained separate and apart from the income account. No annuity payments or payments to charitable organizations have been charged on the books to the principal account, which account includes accumulated profits from sales of securities.

5. Since 1925 the petitioner has appropriated and/or paid certain sums to specific charities as hereinafter set forth. The grantor, while living, approved such gifts. The year, income (exclusive of profits) available as computed by the petitioner, appropriations, number of charities and the year in which payments were made as shown by the petitioner's records are as follows:

Year	Income Available	Amount Appropriated		Number of Charities		Year of Payment
1925 To April 16,	$60,000	$60,000		12		1925
1926 To June 11,	109,000	109,000		3		1926
1927 To June 2,	119,000	0		0		0
1928 To June 2,	214,000	100,000		1		1928
1929 To June 2,	201,000	200,000		1	$150,000	1930
					30,000	1931
					17,242 21	1932
1930 To June 2,	90,000	0		0		0
1931 To June 2,	180,000	180,000		6	160,000	1931
					20,000	1932
1932 To Dec. 31,	113,000	110,000	May 6, 1933	6		1933
1933 To Dec. 28,	60,000	60,000		2		1933

[fol. 72] 6. All of the appropriations mentioned above were made by formal action taken by a committee of the petitioner thereunto authorized and were duly recorded.

7. The market value of the trust corpus was $2,119,835.81 on January 1, 1931, and $1,488,140.43 on December 31, 1931. The accumulated income on hand on January 1, 1931, was $187,999.43, of which $50,000 had already been appropriated to the Boston Floating Hospital, a charity.

8. The income for the year 1931, exclusive of gains, amounted to $118,038.11. Deducting therefrom the annuity payments of $22,350 and the other expenses of $10,403.51 there remained a balance of $85,284.60 available for charities. The petitioner appropriated to five charities in the year 1931 $180,000, which with the $50,000 already appropriated to the Boston Floating Hospital represented a total appropriation to charities at the end of 1931 of $230,000. The amounts paid to charities during 1931 and the dates on which the respective payments were made were as follows, the payment of $30,000 listed under date of September 12 having been made in partial fulfillment of said appropriation of $50,000 to the Boston Floating Hospital.

August 12	$25,000
September 9	25,000
September 12	30,000
November 11	25,000
December 16	85,000
Total	$190,000

9. There remained at the end of 1931 $40,000 unpaid appropriations to charities. Payments aggregating $37,242.21 were made January 20, 1932, on account of these appropriations.

10. The gains from the sale of the securities of the trust in 1931 amounted to $60,901.82.

11. The cost of purchasing annuities for all of the annuitants of 1931 at their ages in that year, if purchased during the first six months of 1931 from the New York Life Insurance Company, would have been $200,804.33.

[fol. 73] 12. The petitioner's returns were made upon a cash receipts and disbursements basis.

13. The petitioner filed a fiduciary return for 1931 showing income apportioned to annuitants and to itself. It also filed an individual return for the same year in which it claimed as deductions on account of sums set aside for charitable and religious purposes amounts equal in the aggregate to the total net income, including capital gains. The Commissioner disallowed all deductions for income set aside for charitable and educational purposes and included the annuity payments as taxable income to the petitioner and determined that there was a deficiency with respect to the petitioner's federal income tax liability for the year 1931 in the sum of $21,589.91, which determination was set forth in a notice of deficiency dated December 28, 1933. On February 20, 1934, the petitioner filed with the United States Board of Tax Appeals a petition for the redetermination of the aforesaid deficiency. By said petition (as amended November 6, 1934) the petitioner contended that all net income of the year and all taxable income resulting from gains made in the year 1931 are deductible in determining the taxable income of the petitioner for the year 1931, pursuant to the terms of Section 162 (a) of the Revenue Act of 1928.

14. By his answer to said petition (as amended November 15, 1934) the Commissioner denied the errors of law and fact complained of by the petitioner.

15. The proceeding duly came on for hearing and was submitted to the Board of Tax Appeals on the basis of a written stipulation of facts and certain exhibits referred to therein and annexed thereto. Under date of October 29, 1935, the Board of Tax Appeals promulgated an opinion wherein the aforesaid stipulated facts and exhibits were, in substance, adopted as the findings of the Board and by which the Commissioner's contentions were, in substance,

sustained. Pursuant to said opinion the Board rendered its decision, which was entered under date of December 13, 1935, redetermined that upon recomputation there is a deficiency in income tax due from the petitioner in its capacity of trustee under said deed of trust for 1931 in the sum of $21,089.77.

[fol. 74] III. Assignments of Error

The petitioner, being aggrieved by the action of the United States Board of Tax Appeals and by the determination and conclusions of law made by the Board, is desirous to obtain a review thereof by the Circuit Court of Appeals for the First Circuit. As reasons for such review it alleges that the United States Board of Tax Appeals committed the following errors:

1. The Board's decision is contrary to law;

2. Statements and conclusions of fact contained in the Board's opinion are contrary to the stipulated facts adopted by the Board as its findings of fact;

3. The Board's conclusions of law and its decision are contrary to said stipulated facts;

4. The Board's conclusions of law and its decision are contrary to its findings of fact;

5. The Board erred in holding that gifts made to charities in 1931 were not deductible unless shown to have been made from gross income received by the trust in that year;

6. The Board erred in not holding that the petitioner is entitled to deduct from its gross income for 1931 the full amount of the difference between the net income as determined by the respondent and the amounts paid to annuitants;

7. The Board erred in not holding that the difference between the petitioner's net income for 1931 as determined by the respondent and the amounts paid to annuitants was during that year permanently set aside for charitable purposes or was to be used exclusively for such purposes within the meaning of Section 162 (a) of the Revenue Act of 1928;

8. The Board erred in not holding that the petitioner's gain from the sale of securities in 1931 was during that year

permanently set aside for charitable purposes or was to be used exclusively for such purposes within the meaning of Section 162 (a) of the Revenue Act of 1928;

9. The Board erred in holding that no deduction on account of gifts to charities was permissible from the income [fol. 75] of 1931 although it appeared from the stipulated facts that out of the income accumulated on January 1, 1931, $50,000 had been previously appropriated to charitabe purposes, so that the balance which remained was less than the amount paid or permanently set aside from income in the year 1931 for charitable purposes within the meaning of Section 162 (a) of the Revenue Act of 1928.

Wherefore the petitioner prays that the action taken by the United States Board of Tax Appeals in this proceeding be reviewed by the United States Circuit Court of Appeals for the First Circuit, that a transcript of the record be prepared in accordance with law and with the rules of said court and transmitted to the clerk of said court for filing and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said court.

Old Colony Trust Company, by its Attorney, Francis V. Barstow.

Duly sworn to by Francis V. Barstow. Jurat omitted in printing.

[fol. 76] Before United States Board of Tax Appeals

[Title omitted]

Notice of Filing Petition for Review—Filed March 11, 1936

To Robert H. Jackson, Esq., Assistant General Counsel for the Bureau of Internal Revenue, Washington, D. C.:

You are hereby notified that the above-named petitioner did on this day file with the clerk of the United States Board of Tax Appeals at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the First Circuit of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review

and the assignments of error as filed is hereto attached and served upon you.

Dated this — day of March, 1936.

Francis V. Barstow, Attorney for Old Colony Trust Company, Petitioner on Review.

Service acknowledged, including copy of petition for review and assignments of error, this eleventh day of March, 1936.

Herman Oliphant, General Counsel for the Department of the Treasury, Attorney for Respondent.

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

PRÆCIPE FOR RECORD—Filed March 11, 1936

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the clerk of the duly certified as correct of the following documents and records in United States Circuit Court of Appeals for the First Circuit copies the above-entitled cause in connection with the petition for review by the Circuit Court of Appeals for the First Circuit heretofore filed by the Old Colony Trust Company, trustee under the indenture of trust referred to in said petition:

1. Docket entries of the proceedings before the Board.

[fol. 77] 2. Pleadings before the Board, to wit,

(a) Petition (filed February 20, 1934);

(b) Answer to petition (filed April 21, 1934);

(c) Amendment to petition (allowed November 6, 1934);

(d) Amendment to answer (allowed November 14, 1934);

(e) Commissioner's settlement under Rule 50 (filed November 29, 1935) including attached recomputation.

3. Opinion and decision of the Board, to wit:

(a) Opinion (including dissenting opinion) promulgated October 29, 1935;

(b) Stipulation of facts (including the several exhibits thereto annexed) which stipulation and exhibits were adopted as the Board's findings by reference.

(c) Decision entered December 13, 1935.

4. Petition for review and assignments of error filed March —, 1936.

5. Notices of filing petition for review, with proofs of service endorsed thereon.

6. This præcipe, notice of filing and proof of service.

Francis V. Barstow, Attorney for Old Colony Trust Company, Petitioner on Review.

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

NOTICE OF FILING PRÆCIPE FOR RECORD—Filed March 11, 1936

To the Honorable Guy T. Helvering, Commissioner of Internal Revenue, Washington, D. C.:

You are hereby notified that the above-named petitioner did on the eleventh day of March, 1936, file with the clerk of the United States Board of Tax Appeals at Washington, D. C., a præcipe for record in the above-entitled proceeding. A copy of the præcipe for record is hereto attached and served upon you.

[fol. 78] Dated this eleventh day of March, 1936.

Francis V. Barstow, Attorney for Old Colony Trust Company, Petitioner on Review.

Service of the foregoing notice, together with a copy of the præcipe for record mentioned therein, acknowledged this eleventh day of March, 1936.

Herman Oliphant, General Counsel for the Department of the Treasury, Attorney for Respondent.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 79] In United States Circuit Court of Appeals for the First Circuit October Term, 1935.

No. 3146

Commissioner of Internal Revenue, Petitioner for Review,

v.

Old Colony Trust Company, Trustee

Before United States Board of Tax Appeals

[Memorandum.—The following papers being already printed in the record on the petition for review by the taxpayer at the pages indicated are here omitted:

	Printed at page
Docket entries	1
Petition with deficiency notice	3
Answer	20
Amendment to Petition	21
Answer to Amendment to Petition	22
Stipulation of Facts with Exhibits A to F, inclusive	22
Opinion of the Board of Tax Appeals	56
Decision	68

A. J. Charron, Clerk.]

Before United States Board of Tax Appeals

[Title omitted]

Petition for Review and Assignments of Error—Filed March 11, 1936

To the Honorable Judges of the United States Circuit Court of Appeals for the First Circuit:

Now comes Guy T. Helvering, Commissioner of Internal Revenue, by his attorneys, Robert H. Jackson, Assistant [fol. 80] Attorney General, Herman Oliphant, General Counsel for the Department of the Treasury, and Hartford Allen, Special Attorney for the Bureau of Internal Revenue, and respectfully shows,

I. Jurisdiction

The petitioner on review (hereinafter referred to as the commissioner) is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States, holding his office by virtue of the laws of the United States.

The respondent on review, Old Colony Trust Company, trustee under an indenture of trust of Paul Wilde Jackson (hereinafter referred to as the taxpayer) is a corporation organized under the laws of the Commonwealth of Massachusetts, with its principal place of business located at Boston, Massachusetts.

The taxpayer filed income tax returns for the calendar year 1931 (Forms 1040 and 1041) with the Collector of Internal Revenue for the District of Massachusetts, whose office is located at Boston, Massachusetts, and within the judicial circuit of the United States Circuit Court of Appeals for the First Circuit.

The Commissioner files this petition pursuant to the provisions of Sections 1001, 1002 and 1003 of the Revenue Act of 1926, as amended by Section 603 of the Revenue Act of 1928, as amended by Section 1101 of the Revenue Act of 1932, as amended by Section 519 of the Revenue Act of 1934.

II. Prior Proceedings

On December 28, 1933, the Commissioner determined a deficiency in income tax against the taxpayer for the year 1931 in the amount of $21,589.91 and sent by registered mail a notice of said deficiency in accordance with the provisions of Section 272 (a) of the Revenue Act of 1928. Thereafter, and on February 20, 1934, the taxpayer filed an appeal from the said determination with the United States Board of Tax Appeals, contesting the amount of the deficiency determined by the Commissioner as aforesaid. The Commissioner filed his answer to the said petition on April 21, 1934, denying the allegations of error contained in said petition. The case was tried before the United States Board of Tax Appeals on November 21, 1934.

[fol. 81] On October 29, 1935, the Board promulgated its opinion and on December 13, 1935, entered its decision, wherein it was ordered and decided that there is a deficiency in income tax due from the taxpayer for the calendar year 1931 in the amount of $21,089.77.

III. Nature of Controversy

The Old Colony Trust Company, the taxpayer herein, is the surviving trustee under a deed of trust executed by Paul Wilde Jackson on July 19, 1922. The trust indenture provided for certain distributions in connection with the trust property, including payments to charitable organizations.

During the year in controversy, viz., 1931, the total payments made to charities amounted to $190,000. The Commissioner determined that the net income of the trust for the year 1931 (including capital net gain) amounted to $164,339.39. The accumulated income of the trust at January 1, 1931, was $187,999.43. The cash balance at the same date amounted to $193,779.43.

The question presented to the Board was whether the distribution of the $190,000 constituted an allowable deduction from the gross income of the trust under the provisions of Section 162 (a) of the Revenue Act of 1928.

The Commissioner contended that there was no provision in the deed of trust to the effect that the payments to charitable beneficiaries could be disbursed exclusively from income, that such payments therefore could invade the corpus, and hence were not deductible from the gross income of the trust.

The Commissioner further contended that, if the Board should hold that under the provisions of the trust deed the payments could be made from income, then such payments, in order to be deductible from the gross income of the trust, must be shown to have been made out of the gross income for the year in which the deductions are claimed.

The Board denied the first contention of the Commissioner and held that of the total payment of $190,000 the amount of $2,000.57 was allowable as a deduction from gross income for the year 1931. The latter sum—in conformity with the theory advanced by the Commissioner's second contention [fol. 82]—was held to have been paid out of the current 1931 gross income, and the balance of $187,999.43 paid out of the accumulated income as at January 1, 1931.

The propriety of the Board's denial of the Commissioner's contention referred to above is presented for review.

IV. Assignments of Error

The Commissioner avers that in the record and proceeding before the Board of Tax Appeals and in the opinion

and final decision rendered and entered by the Board of Tax Appeals manifest error occurred and intervened to the prejudice of the Commissioner who now assigns the following errors and each of them, which he avers occurred in the said record, proceeding, opinion and final decision so rendered and entered by the Board of Tax Appeals:

1. The Board erred in holding that the taxpayer was entitled to a deduction from gross income for the year 1931 of an amount of $2,000.57 paid to charitable organizations.

2. The Board erred in holding that the amount of $2,000.57 was paid out of the gross income of the estate created under the trust indenture.

3. The Board erred in failing to hold that the amount of $2,000.57 was paid out of the corpus of the estate created under the trust indenture.

4. The Board erred in holding that the trust indenture provided that payments to charitable organizations could be made out of the gross income of the trust estate.

5. The Board erred in holding that under the provisions of the trust indenture the contributions to charitable organizations were paid, or were payable, exclusively from the gross income of the trust estate.

6. The Board erred in failing to hold that under the provisions of the trust indenture contributions to charitable organizations were paid, or were payable, out of the corpus of the trust estate.

7. The Board erred in failing to hold that under the provisions of the trust indenture contributions to charitable organizations were paid, or were payable, exclusively from the corpus of the trust estate.

[fol. 83] 8. The Board erred in finding a deficiency in income tax due from the taxpayer for the year in controversy in the amount of only $21,089.77.

9. The Board erred in failing to find that there was a deficiency in income tax due from the taxpayer for the year 1931 in the amount of $21,589.91.

Wherefore, the Commissioner petitions that the decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the First Circuit, that

a transcript of the record be prepared in accordance with the law and with the rules of said court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said court.

Robert H. Jackson, Assistant Attorney General. Herman Oliphant, General Counsel for the Department of the Treasury. Of Counsel: Hartford Allen, Special Attorney, Bureau of Internal Revenue.

Duly sworn to by Hartford Allen. Jurat omitted in printing.

[fol. 84] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

NOTICE OF FILING PETITION FOR REVIEW—Filed March 18, 1936

To Old Colony Trust Company, Trustees under an Indenture of Trust of Paul Wilde Jackson, 17 Court Street, Boston, Massachusetts; Francis V. Barstow, Esq., 53 State Street, Boston, Massachusetts:

You are hereby notified that the Commissioner of Internal Revenue did, on the eleventh day of March, 1936, file with the clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the First Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you

Dated this eleventh day of March, 1936.

Herman Oliphant, General Counsel for the Department of the Treasury.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein, is hereby acknowledged this twelfth day of March, 1936.

Old Colony Trust Company, by C. M. Gordon Trust, Respondent on Review. Francis V. Barstow, Attorney for Respondent on Review.

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

PRÆCIPE FOR RECORD—Filed April 7, 1936

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the clerk [fols. 85-86] of the United States Circuit Court of Appeals for the First Circuit copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the First Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of proceedings before the Board.
2. Pleadings before the Board:
   (a) Petition, including copy of deficiency notice.
   (b) Answer.
   (c) Amendment to Petition.
   (d) Answer to Amendment to Petition.
3. Opinion of Board.
4. Decision of Board.
5. Petition for review and notices of filing.
6. Stipulation of facts, including Exhibits A, B, C, D, E and F.
7. This præcipe.

Herman Oliphant, General Counsel for the Department of the Treasury.

Service of a copy of the within præcipe is hereby admitted this fourth day of April, 1936.

Francis V. Barstow, Attorney for Respondent on Review.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 87] IN UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE FIRST CIRCUIT, OCTOBER TERM, 1936

No. 3145

OLD COLONY TRUST COMPANY, Trustee,

Petitioner for Review,

v.

COMMISSIONER OF INTERNAL REVENUE

No. 3146

COMMISSIONER OF INTERNAL REVENUE, Petitioner for Review,

v.

OLD COLONY TRUST COMPANY, Trustee.

Appeals from Board of Tax Appeals

Before Bingham, Wilson and Morton, JJ.

OPINION OF THE COURT—Filed December 10, 1936

WILSON, J.:

These cases are brought before this court on petitions filed March 11, 1936, one by the Old Colony Trust Company as Trustee (hereinafter referred to as the trustee or taxpayer) under an indenture executed by Paul Wilde Jackson, and a cross-petition filed by the Commissioner of Internal Revenue, each petitioner seeking a review of the decision of the Board of Tax Appeals entered December 13, 1935, determining a deficiency tax against the trustee for the calendar year 1931, of $21,089.77. On petitions for review of decisions of the Board of Tax Appeals only questions of law are open for consideration by this court.

[fol. 88] The question presented by the taxpayer's petition for review and assignments of error is whether the Board of Tax Appeals erred as a matter of law in that its decision is contrary to the stipulation of facts in the case and to its findings of fact, and also erred in finding that a deficiency tax of $21,089.77 was due from the taxpayer. The main question presented by the Commissioner's peti-

tion for review and assignments of error is whether the Board of Tax Appeals, in computing the taxable income of the taxpayer for that year, erred in holding that the sum of $2,000.57 was paid by the taxpayer from the gross income of the year 1931 to charitable organizations and not from the corpus of the trust, and that the taxpayer was entitled to a deduction of that amount in determining its taxable income for that year.

The statute determinative of the questions submitted is Sec. 162 of the Revenue Act of 1928, which provides that the net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—

(a) There shall be allowed as a deduction [in lieu of the deduction for charitable, etc., contributions authorized by section 23(n)] any part of the gross income, without limitation, which pursuant to the terms of the will or deed creating the trust, is during the taxable year paid or permanently set aside for the purposes and in the manner specified in section 23(n), or is to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, or for the establishment, acquisition, maintenance or operation of a public cemetery not operated for profit.

The deed of trust, after providing for certain legacies and also for the payment of stated annuities to a number of individuals, contained the following provisions:

"13. *I authorize* my said trustees to pay to charities as hereinafter described such sums as in their judgment may be paid without jeopardizing the annuities herein provided for, whenever for a period of one year the trust fund held by them as then invested shall have yielded a net income equal to twice the amount of the annuities which they are then required to pay, and upon the death of the survivor [fol. 89] of those persons, who under the terms of this instrument are to receive annual incomes under the trust hereby created, *I direct* my said trustees to distribute the rest and residue remaining in their hands among corporations and trustees organized, operating and holding exclusively for religious, charitable, scientific, literary or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, the sum

paid over by said trustees to such corporations or boards of trustees to be held by such corporations and boards of trustees in trust, and the income thereof to be expended for the general purposes for which such corporation and boards of trustees are organized, and I request that said funds be designated by each corporation or board of trustees as the Henry Clay Jackson Fund." (Italics supplied.)

These are the only sections of the statute and provisions of the trust deed that it is necessary to consider in disposing of these cases. The government in its brief contends, and we think correctly, that in order for payments to charitable institutions from the income of any particular year to be deductible, they must be directed by the person creating the trust and not be left to the judgment of the fiduciary. Bowers v. Slocum et al., 20 Fed. (2d) 350, 352; Guaranty Trust Co. of New York, Exr., v. Commissioner, 31 B. T. A. 19, 22; Charles P. Moorman Home for Women et al. v. United States, 42 Fed. (2d) 257, in which latter case the court said (pp. 260, 261):

"The quoted language of section 219 of the act of 1918 makes it clear that the trust income, to be exempt from taxation as a charitable contribution, must be paid to or permanently set aside during the taxable year for a corporation organized and operated exclusively for charitable purposes, and that such payment or permanent setting aside must be pursuant to the terms of the instrument creating the trust. In other words, the instrument creating the trust must make it clear that it was the intention of the creator of the trust that such income should be paid during the taxable year to the charitable corporation or permanently set aside to it during such taxable year. The statute makes it very clear that it was not the intention of Congress to make the taxability of the income for any taxable year de-[fol. 90] pend upon the discretion of the trustee in paying or permanently setting aside the income of the trust to the charitable purpose during the taxable year, but to depend solely upon the provisions of the instrument creating the trust."

* * * * * * *

"Section 219(b) of the Revenue Act of 1924 grants the exemption, not only in cases where the income has been paid to or permanently set aside for the charitable purpose

during the taxable year, but also in those cases where the income received during the taxable year is to be used exclusively for the charitable purpose. As in the acts of 1918 and 1921, however, the determining factor is the instrument creating the trust, and not the discretion of the trustee. Therefore, under the 1924 act, unless it appears from the instrument creating the trust that the income from which exemption is sought is set aside in the instrument creating the trust exclusively for a charitable purpose, or under the terms of that instrument is to be paid during the taxable year or permanently set aside during that year for the charitable purpose, it is not exempt."

Boston Safe Deposit & Trust Co. v. Commissioner, 66 Fed. (2d) 179, 183.

Article 862 of Treasury Regulation 74 promulgated under the Revenue Act of 1928 evidently construing Sec. 162 of that Act, provides as follows:

"(1) If the terms of the will or of the deed creating the trust direct that any part of the gross income of the estate or trust (a) be paid or permanently set aside for charitable or other purposes, as specified in section 23(n), or (b) be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, or for the establishment, acquisition, maintenance, or operation of a public cemetery not operated for profit, such gross income so paid or set aside during the taxable year shall be allowed as a deduction in lieu of the deduction authorized by section 23(n)."

The same rule is applied in determining estate taxes in case of bequests to charitable institutions. If the bequests in the will are specific, that is, to some named charitable institutions, the bequest is exempt from the estate tax, but [fol. 91] if the gift is left to the discretion of a fiduciary under the terms of the will, it is held to be taxable. Helvering v. Pardee, Case No. 77,290 U. S. 365, 370-1; Burnet v. Whitehouse, 283 U. S. 148; Mississippi Valley Trust Co. v. Commissioner, 72 Fed. (2d) 197.

Unless the trust instrument, therefore, unqualifiedly requires a distribution of the income of any year to charitable institutions, a deduction of the amount of such distribution is not permissible in computing the income tax for that year. State Savings Loan & Trust Co. v. Commissioner, 63 Fed.

(2d) 482. Distribution by a fiduciary in its discretion under authority vested in him in the trust deed does not entitle the taxpayer to a deduction from the gross income of any year.

Applying this principle to Sec. 13 of the deed of trust, the trustor first *authorized* the trustees to pay to charitable institutions such sums as in their judgment may be paid without jeopardizing the annuities therein provided for, and whenever for a period of one year the trust fund held by them as then invested shall have yielded a net income equal to twice the amount of the annuities which they are required to pay. It is evident from this language that the surviving trustee is not directed by the deed of trust to make any payments to charitable institutions until the death of the last survivor of the annuitants. It may, however, if in the judgment of the trustee the annuities are not jeopardized, make advance payments to charitable institutions under the authority given it in Par. 13 of the deed of trust, either from the corpus of the trust or from what the trustee terms "accumulated income" of past years, or from income of the current year; but any payments to charities from the current income of any year merely by virtue of the authority vested in the trustee under the deed of trust, are not directed by the trustor and are not deductible from the gross income of the year in which the payments are made in computing the income tax for that year.

While the beneficent purpose of Congress in exempting payments to charitable organizations from taxation is well recognized, an exemption, even of this nature, must be clearly authorized by Congress. Sun-Herald Corp. v. Duggan, 73 Fed. (2d) 298, 300.

[fol. 92] The Board of Tax Appeals found that the sum of $2,000.57 was paid from the income of 1931 to charitable institutions and was deductible in determining the income tax of that year. The Commissioner contends that this sum was paid from the corpus of the trust and that the entire income of 1931, with the usual deductions allowed to an individual, is subject to an income tax.

According to the findings of the Board of Tax Appeals, the Commissioner was wrong in contending that this amount was paid from the corpus of the trust. From the stipulation of facts the Board was right in holding that it was paid

from income. However, under our construction of the statutes and the deed of trust, it makes no difference in computing the tax from what source it was taken, since it was not *directed* to be paid to charities by the trustor under the deed of trust.

Nor can it be held that any part of the income for the year 1931 was, by direction of the trustor in the deed of trust, set aside permanently for charities, or to be so used, since it might at any time be used for payments to charities in the discretion of the trustee whenever the income for any one year equaled twice the amount due the annuitants for that year. Under the deed of trust it was not until the last survivor of those entitled to receive income thereunder had died that the trustee can be said to have been directed to distribute to charities any part of the trust fund or income thereof remaining in the hands of the trustee.

It is, therefore, held that no part of the gross income for the year 1931 was, under the deed of trust by direction of the trustor, paid or permanently set aside, or was to be used for distribution to charities; and the Board erred in deducting the sum of $2,000.57 from the gross income in computing the income tax of the trust for that year. Upon this record the amount of the tax as computed by the Commissioner in the first instance was correct, even though he erred as to the source of the payment of $2,000.57.

The cases are remanded to the Board of Tax Appeals for further proceedings in accordance with this opinion.

[fol. 93] Dissenting Opinion—Filed December 10, 1936

Morton, J. (dissenting):

The statute allows as a deduction "any part of the gross income * * * which pursuant to the terms of the will or deed creating the trust" is paid to charities as defined by the Act. In the present case the deed of trust expressly *authorized* the trustee to pay to charities "such sums" (not necessarily income) as in its judgment might be so paid without jeopardizing certain specified annuities, and directed that on the termination of the annuities the entire fund should be so paid. Under this provision the trustees made payments to certain proper charities.

The question is whether these payments are deductible from the income of the trust. It is a very narrow question,

depending on what is meant by the statutory expression, "pursuant to the terms of the will or deed." The majority opinion holds that these words covered only payments absolutely *directed* or *required* to be made by the will or deed in question.

I think this construction unduly narrows the statute. "Language used in tax statutes should be read in the ordinary and natural sense." Helvering, Commissioner, v. San Joaquin Co., 297 U. S. 496, 499. "Pursuant to" is by no means the equivalent of *directed* or *required*. Its common synonyms are "under," "in accordance with," or "authorized by." The phrase as used in this statute seems not to have been judicially defined except in Moorman Home v. United States, 42 Fed. (2d) 257, a District Court case which is followed in the majority opinion. In other statutes, and in indictments, it has always been given its natural meaning. As used in an old English statute, it was held to cover anything done in good faith, "either under the powers which the Act gives or in the discharge of the duties which it imposes." Smith v. Shaw, 10 B. & C. (Eng.) 277. See too Hermann v. Seneschal, 13 C. B. n. s. 392. "Pursuant to law" used in United States Revised Statutes, sec. 848 (28 U. S. C. A. sec. 601) has also been given a broad construction. Hanchett v. Humphrey, 93 Fed. 895, 896; United States v. Sanborn, 28 Fed. 299, 302 (C. C. Mass.), reversed on other grounds. United States v. Nunnemacher, 7 Bissell [fol. 94] (U. S.) 129, 137, and United States v. Boyden, 1 Lowell (U. S.) 266, show how the phrase has been construed in indictments. See also Spring v. Robinson, 2 Pinney (Wis.) 97, 99.

The interpretation placed upon the statute in the majority opinion seems to me to be completely at variance with the ordinary understanding of the phrase used and with the long recognized judicial interpretation of it. It is well settled that provisions in favor of charities should receive, as against the government, a liberal interpretation in order to encourage such gifts. This purpose is certainly not furthered by straining the language of the Act, so as to refuse the deduction on payments to charity authorized by a will or deed to be made if certain facts exist, the determination as to the required facts being left to the discretion of trustees. The decisions relied on in the majority opinion relate to other statutes, not containing the phrase in ques-

tion, and to essentially different questions and facts. They do not seem to me significant on the present question, except perhaps the observation in Burnet v. Whitehouse, 283 U. S. 148 that, "The exemption • • • is plain and should not be destroyed by any strained construction of general language," etc. (McReynolds, J., p. 151). Under this statute I think that any payment to charity as therein defined which is authorized by the will or deed is an allowable deduction.

[fols. 95-96] In United States Circuit Court of Appeals

Minute Entry of Hearing

On October 16, 1936, these causes came on to be heard together, and were fully heard by the court, Honorable George H. Bingham, Honorable Scott Wilson and Honorable James M. Morton, Jr., Circuit Judges, sitting.

In United States Circuit Court of Appeals

Final Decree—December 10, 1936

This cause came on to be heard October 16, 1936, upon the record on cross petitions for review of the United States Board of Tax Appeals, and was argued by counsel.

Upon consideration whereof, it is now, to wit, December 10, 1936, here ordered, adjudged and decreed as follows: The case is remanded to the Board of Tax Appeals for further proceedings in accordance with the opinion passed down this day.

By the Court, Arthur L. Charron, Clerk.

Recital as to Stay of Mandate

Thereafter, to wit, on January 5, 1937, mandate was stayed until further order of court.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 97] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 15, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 41,243. United States Circuit Court of Appeals, First Circuit. Term No. 703. Old Colony Trust Company, Trustee, Petitioner, vs. Commissioner of Internal Revenue. Petition for a writ of certiorari and exhibit thereto. Filed February 4, 1937. Term No. 703, O. T., 1936.

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CHARLES ELMORE C
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Supreme Court of the United States.

OCTOBER TERM, 1936.

No. 703

OLD COLONY TRUST COMPANY, TRUSTEE,
PETITIONER,

v.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

AND

BRIEF IN SUPPORT THEREOF.

FRANCIS V. BARSTOW,
HAROLD S. DAVIS,
Attorneys for Petitioner.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

TABLE OF CONTENTS.

	Page
PETITION FOR CERTIORARI	1
BRIEF	11
Opinions below	11
Jurisdiction	11
Questions presented	12
Statement	14
Specification of Errors	19
Argument	21
I. The Contributions made during 1931 were deductible as Payments made for charitable Purposes pursuant to the terms of the Trust Instrument	21
1. The Construction given by the Majority of the Circuit Court of Appeals to the Words "Pursuant to the Terms of the Will or Deed creating the Trust" is manifestly wrong	21
2. The Majority of the Board of Tax Appeals erred in Holding that the Taxpayer must affirmatively prove that the Payments in Question were actually made out of Money received during 1931 and not from accumulated Income on Hand at the Beginning of the Year	27
II. If the Payments in Question are disregarded, the Receipts of the Trust for 1931 (above the Amounts required to pay Annuities and Expenses) constituted Income "to be used exclusively" for charitable Purposes	30

TABLE OF CITATIONS.

CASES.

	Page
Boston Safe Deposit & Trust Co. v. Commissioner of Internal Revenue (C.C.A. 1) 66 Fed. (2d) 179	9, 31, 32
Bowers v. Slocum (C.C.A. 2) 20 Fed. (2d) 350	24
Charles P. Moorman Home for Women v. United States (D.C. W.D. Ky.) 42 Fed. (2d) 257	25
Cochran v. United States, 254 U.S. 387	32
First National Bank of Birmingham v. Snead (C.C.A. 5) 24 Fed. (2d) 186	32
General Utilities & Operating Co. v. Helvering, 296 U.S. 200	23
Hartford-Connecticut Trust Co. v. Eaton (C.C.A. 2) 36 Fed. (2d) 710, affirming (D.C. Conn.) 29 Fed. (2d) 840	8, 9, 31
Hartford-Connecticut Trust Co. v. Eaton (D.C. Conn.), 41 Fed. (2d) 69	31
Helvering v. Bliss, 293 U.S. 144	22
Henry v. United States, 251 U.S. 393	32
Humphrey v. Millard (C.C.A. 2) 79 Fed. (2d) 107, affirming (D.C. W.D. N.Y.) 8 Fed. Supp. 784	32
Ithaca Trust Company v. United States, 279 U.S. 151	32
Lederer v. Stockton, 260 U.S. 3	21, 28
Lincoln v. Ricketts, 297 U.S. 373	22
Simpson v. United States, 252 U.S. 547	32

TEXTBOOKS.

Black's Law Dictionary (3d Ed.)	23
New Standard Dictionary	23
Paul and Mertens's Law of Federal Income Taxation	26, 28
Webster's New International Dictionary (2d Ed.)	23

CONSTITUTION OF THE UNITED STATES.

Page

Article VI 24

STATUTES.

Judicial Code, §240 (as amended by Act of Feb. 13, 1925, c. 229, §1, 43 Stat. 938) 11
Revenue Act of 1918, §219 25
Revenue Act of 1928, §23 12n.
Revenue Act of 1928, §120 21
Revenue Act of 1928, §162 3, 4, 5, 6, 7, 8, 12, 16, 17, 20, 25, 29
Revenue Act of 1932, §162 7, 12
Revenue Act of 1934, §162 7, 12
Revenue Act of 1936, §162 7, 12
U.S. Code, Title 28, §347 (a) 11

Supreme Court of the United States.

OCTOBER TERM, 1936.

No.

OLD COLONY TRUST COMPANY, TRUSTEE,
PETITIONER,

v.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:—

The Old Colony Trust Company, a corporation organized under the laws of Massachusetts, respectfully represents as follows:—

1. The petitioner is the surviving trustee under a deed dated July 22, 1922, whereby Paul Wilde Jackson, a resident of Braintree, Massachusetts, conveyed to the petitioner and George E. Brock (who died June 10, 1923) property of large value in trust to make certain outright payments not now material and to pay annuities in specified amounts to various individuals. The deed then continued as follows:—

> "13. I authorize my said trustees to pay to charities as hereinafter described such sums as in their judgment may be paid without jeopardizing the annuities

herein provided for, whenever for a period of one year the trust fund held by them as then invested shall have yielded a net income equal to twice the amount of the annuities which they are then required to pay, and upon the death of the survivor of those persons, who under the terms of this instrument are to receive annual incomes under the trust hereby created, I direct my said trustees to distribute the rest and residue remaining in their hands among corporations and trustees organized, operating and holding exclusively for religious, charitable, scientific, literary or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, the sum paid over by said trustees to such corporations or boards of trustees to be held by such corporations and boards of trustees in trust, and the income thereof to be expended for the general purposes for which such corporations and boards of trustees are organized, and I request that said funds be designated by each corporation or board of trustees as the Henry Clay Jackson Fund."

2. The income of the trust for each year since the petitioner has held the principal has been more than twice the annuity payments required in such year by the terms of the trust.

3. The principal (corpus) account of the trust has always been maintained separate and apart from the income account.

4. The accumulated income on hand on January 1, 1931, was $187,999.43. On the same date the market value of the trust corpus was $2,119,835.81. The capital value of the annuities in 1931 was approximately $200,000.

5. The gross income of the trust for the year 1931 (including gains from the sale of securities aggregating

$60,901.82) was $175,319.18. The annuity payments during that year aggregated $22,350. The expenses of the trust for the same year aggregated $11,029.79. There remained therefore a balance of $141,939.39 which it was competent for the trustee to apply to charity in accordance with the terms of the deed.

6. During the year 1931 the petitioner in the exercise of the power conferred upon it by the deed paid to various charities a total of $190,000, all these charities being of the kind referred to in §162 (a) of the Revenue Act of 1928.* Each of these payments was charged by the petitioner against the income of the trust.

7. The petitioner filed a fiduciary return for 1931 showing income apportioned to the annuitants and to itself. It also filed an individual return for the same year in which, in reliance on §162 (a) of the Revenue Act of 1928, it claimed as deductions on account of sums applied to charity amounts equal in the aggregate to the total net income, including capital gains. The Commissioner of Internal Revenue disallowed any deduction on the sole ground that it was "not disclosed that payments were made out of income of the taxable year to the charities nor that any portion of

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* The material part of §162 of the Revenue Act of 1928 is as follows:—

"*Sec. 162. Net income.* The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—

"*Sec. 162.* (*a*) There shall be allowed as a deduction (in lieu of the deduction for charitable, etc., contributions authorized by section 23 [n]) any part of the gross income, without limitation, which pursuant to the terms of the will or deed creating the trust, is during the taxable year paid or permanently set aside for the purposes and in the manner specified in section 23 (n), or is to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, or for the establishment, acquisition, maintenance or operation of a public cemetery not operated for profit.

the income was credited to charity." The petitioner thereupon applied to the Board of Tax Appeals for a redetermination.

8. At the hearing before the Board of Tax Appeals it was not contended by the Commissioner that the payments in question were not made "pursuant to the terms of the . . . deed creating the trust" within the meaning of §162 (a) of the Revenue Act of 1928 and the hearing proceeded on the footing that they were so made. The question considered was whether it was necessary for the trustee, in order to enjoy the benefit of the deduction, to show that the payments were made out of income received during 1931.

9. The Board of Tax Appeals unanimously held that the payments in question were not made out of principal. The majority held (1) that, in view of the possibility that accumulated income might in some future year be used for annuity payments, the income received by the trust during 1931 and not required for expenses or for the annuity payments of that year did not constitute income "to be used exclusively" for charitable purposes within the meaning of the statute and (2) that, as regards sums actually paid to charitable institutions during 1931, it was incumbent upon the trustee to prove affirmatively that these sums were paid out of income received in the same year; it was held that as to contributions aggregating $2,000.57 it appeared that these were made from the gross income of 1931 and might, therefore, be claimed as deductions, but that as to the balance of the contributions in question (aggregating $187,999.43) the trustee had not shown that the payments were so made and that in consequence they were not deductible. The minority, without undertaking to determine whether the income in question was "to be used exclusively" for charitable purposes, held in substance that the

deduction should be allowed on the ground that contributions which are as between trustee and beneficiary properly chargeable against the amounts constituting for tax purposes the gross income of the trust are to be allowed as deductions and that it is immaterial whether the trustee takes the money so applied out of income actually received during the current year or takes it out of income on hand at the beginning of the year and suffers the income thereafter received to accumulate.

10. Both parties petitioned the Circuit Court of Appeals for the First Circuit to review the decision of the Board of Tax Appeals. The trustee assigned as error the Board's holdings "that gifts made to charities in 1931 were not deductible unless shown to have been made from gross income received by the trust in that year" and "that the difference between the petitioner's net income for 1931 as determined by the respondent and the amounts paid to annuitants was . . . [not] to be used exclusively for charitable purposes within the meaning of Section 162(a) of the Revenue Act of 1928." The Commissioner assigned as error the Board's failure to hold "that the amount of $2,000.57 was paid out of the corpus of the estate created under the trust indenture." The docket numbers of the two cases in the Circuit Court of Appeals are 3145 and 3146 respectively.

11. At the hearing in the Circuit Court of Appeals the Commissioner put forward as his principal reliance a contention that, even if all the payments in question were unquestionably made out of income received during the same year, none of them were deductible, because the deed did not imperatively require them to be made, but gave the trustees power to make them as a matter of discretion; it was said that for this reason the payments could not be deemed to have been made "pursuant to the terms of the deed creating the trust" within the meaning of §162 (a) of the Revenue Act

of 1928. The respondent argued that the Board of Tax Appeals rightly proceeded on the assumption that the words "pursuant to" were to be taken in their normal sense of "agreeably to" or "in accordance with" and that on this assumption the minority of the Board were right in maintaining that the petitioner, in order to be entitled to the deduction, was not bound to prove affirmatively that the sums contributed to charity during 1931 were paid from the particular income received during that year and not from the accumulated income of former years. It was further argued by the petitioner that, if the income should not be deemed to have been paid for charitable purposes during 1931, it must be regarded as income "to be used" for such purposes within the meaning of §162 (a) of the Revenue Act of 1928, inasmuch as the entire trust estate was by the express terms of the will devoted in the first instance to charity and as there was only a theoretical possibility that there would ever be occasion to divert accumulated income to non-charitable purposes.

12. The majority of the Circuit Court of Appeals, without passing upon the issue which had given rise to the division of opinion in the Board of Tax Appeals, sustained the contention made by the Commissioner as to the meaning of the words "pursuant to" and further held that none of the income in question was "to be used" for charitable purposes within the meaning of the statute; it was accordingly ordered that the case be remanded to the Board of Tax Appeals with instructions to reinstate the Commissioner's determination *in toto*. Judge Morton filed a dissenting opinion.

13. The decision of the Circuit Court of Appeals presents in the following particulars points calling for review by this court:—

I. Concerning the right to claim deductions on account of payments actually made to charitable institutions during the taxable year,—

(*a*) As to whether these payments were made "pursuant to" the terms of the trust instrument,—

(i) The language of §162 (a) of the Revenue Act of 1928 is repeated without change in the respective sections of the same number in the Revenue Acts of 1932, 1934 and 1936. Provisions whereby trustees are authorized, but not absolutely required, to apply the income of the trust estate to charity are found in many trust instruments. If the present decision stands, it will mean that not only under the Revenue Act of 1928, but under the several later acts, all the income of such estates is taxable, even though applied in its entirety to charity. The public interest in the authoritative determination of this question is manifest.

(ii) If it was competent for the Commissioner to insist for the first time at the argument before the Circuit Court of Appeals that the payments in question were not made "pursuant to" the terms of the trust instrument, the construction put upon these words by the majority of the court is plainly wrong. As pointed out in the dissenting opinion, this construction is not only inconsistent with the policy of Congress in encouraging contributions to charity, but is repugnant both to common usage and to substantially all the authorities, both federal and otherwise.

(*b*) As to whether the petitioner had the burden of showing that the payments were made out of funds received during the taxable year and not out of accumulated income,—

(i) The ruling of the majority of the Board of Tax Appeals to the effect that the petitioner must show from what receipts the payments to charities were made in order to claim a deduction is inconsistent with the plain intent of Congress.

(ii) The effect of this ruling, if it were finally accepted, would be largely to render nugatory the provision for the deduction of contributions by trust estates to charity, since the practical exigencies of administration often make it necessary to carry over income from one year to another and impossible to determine whether a particular payment is made from funds received during the current year.

II. Concerning the right to claim a deduction on the ground that the excess of the income of the trust for the taxable year over the expenses and annuity payments for that year, whether paid out or not, was "to be used exclusively" for charitable purposes,—

The trust deed required that the entire estate, both principal and income, be applied, except so far as necessary for the purposes of the annuities, to charity. The excess in the income of 1931 over the limited amount required for the annuity payments of that year thus became charged with a charitable trust, subject to the condition subsequent that in some future year the trustee might draw upon it to provide the annuity payments then accruing. In *Hartford-Connecticut Trust Co.* v. *Eaton*, 36 Fed. (2d) 710, the Circuit Court of Appeals for the Second Circuit (affirming 29 Fed. [2d] 840) held that in such a situation the excess of the receipts over the aggregate of the annuity payments for the current year constitutes income "to be used exclusively for religious, charitable, scientific or educational purposes" within the meaning of §162 (a) of the Revenue Act of 1928, notwithstanding the possibility that through the operation of the condition subsequent such excess may be diverted to a non-charitable use. In the case at bar it was held on the contrary that, so long as such a condition subsequent is outstanding, even though the possibility that it may ever take effect is very remote, the sums in question cannot be regarded

as income "to be used exclusively" for charitable purposes; in this particular the decision was in line with the opinion rendered by the same court in *Boston Safe Deposit & Trust Co.* v. *Commissioner of Internal Revenue*, 66 Fed. (2d) 179, in which the view taken in *Hartford-Connecticut Trust Co.* v. *Eaton, supra*, was expressly disapproved. The case thus presents a conflict between the decisions in two circuits upon an important question of statutory construction.

The petitioner therefore prays that a writ of certiorari issue out of this court to the United States Circuit Court of Appeals for the First Circuit commanding that the said cases numbered respectively 3145 and 3146 be certified to this court for review and determination.

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Questions Presented.

As will be seen from the several opinions of the Board of Tax Appeals and of the Circuit Court of Appeals, the case turns upon the construction of Section 162 of the Revenue Act of 1928, which is identical with the respective sections similarly numbered in the Revenue Acts of 1932, 1934 and 1936 and which in its material part is as follows:—

> "*Sec. 162. Net income.* The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—
>
> "*Sec. 162.* (*a*) There shall be allowed as a deduction (in lieu of the deduction for charitable, etc., contributions authorized by section 23 [n]*) any part of

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* The material part of §23 of the Revenue Act of 1928 is as follows:—

"In computing net income there shall be allowed as deductions:

* * * * * * * *

"(*n*) *Charitable and other contributions.*—In the case of an individual, contributions or gifts made within the taxable year to or for the use of:

"(1) the United States, any State, Territory, or any political subdivision thereof, or the District of Columbia, for exclusively public purposes;

"(2) any corporation, or trust, or community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual;

* * * * * * * * *

to an amount which in all the above cases combined does not exceed 15 per centum of the taxpayer's net income as computed without the benefit of this subsection. Such contributions or gifts shall be allowable as deductions only if verified under rules and regulations prescribed by the Commissioner, with the approval of the Secretary. (For unlimited deduction if contributions and gifts exceed 90 per centum of the net income, see section 120.)"

> the gross income, without limitation, which pursuant to the terms of the will or deed creating the trust, is during the taxable year paid or permanently set aside for the purposes and in the manner specified in section 23 [n], or is to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, or for the establishment, acquisition, maintenance or operation of a public cemetery not operated for profit."

The issue is whether, in computing the net income of the petitioner for 1931 as trustee under the deed of trust referred to below, the petitioner is entitled to a deduction equal to the excess of income over the sums required to pay the expenses and certain annuities either (*a*) because the trustee during the same year made contributions out of income to charitable purposes aggregating more than this excess or (*b*) because the entire excess was in view of the terms of the trust "to be used exclusively" for charitable purposes.

The Commissioner of Internal Revenue disallowed the deduction altogether (R. 10). The Board of Tax Appeals unanimously allowed a deduction to the extent of $2,000.57; subject to the dissent of four members the remainder of the sum in controversy was held non-deductible (R. 65-66). Upon cross-petitions for review the majority of the Circuit Court of Appeals held that no deduction whatever was allowable, whereas the third member of the court held that the deduction claimed by the taxpayer should be allowed. The conclusion of the majority was based mainly on the theory that a payment for charitable purposes may not be regarded as having been made "pursuant to the terms" of a trust instrument within the meaning of §162 (a) unless the instrument imperatively requires the trustee to make such contribution, so that, if a contri-

1931 (R. 26). The accumulated income on hand on January 1, 1931, was $187,999.43 (R. 60).

The gross income for the year 1931, exclusive of gains, was found by the Board of Tax Appeals to have been $114,417.36 (R. 60). The Board found that in the same year the trust received from the sale of securities income of $60,901.82 (R. 60). The gross income of the trust for 1931 therefore amounted in all to $175,319.18, whereas the total of the annuities distributed or distributable in that year was $22,900 (R. 27, 61). Deducting from this total $22,350 (which was the amount actually paid out during 1931 on account of the annuities) and $11,029.79 on account of expenses there remained a balance of $141,939.39 available for charities (R. 23, 60).

During the year 1931 the trustee paid to various institutions (each of which was admittedly charitable within the meaning of §162 [a] of the Revenue Act of 1928) a total of $190,000, all of these payments being shown in the books of the trust as payments out of income (R. 26).

The cost of purchasing annuities for all of the annuitants of 1931, if purchased during the first six months of 1931 from the New York Life Insurance Company, would have been $200,804.33 (R. 27, 61).

The petitioner filed a fiduciary return for 1931 showing income apportioned to the annuitants and to itself (R. 23). It also filed an individual return for the same year in which it claimed as deductions on account of sums set aside for charitable and religious purposes amounts equal in the aggregate to the total net income, including capital gains (R. 23). The Commissioner disallowed all these deductions (R. 24). The sole reason assigned by the Commissioner for the disallowance was that "it is not disclosed that payments were made out of income of the taxable year to the charities nor that any portion of the income was credited to any charity" (R. 12).

At the hearing before the Board of Tax Appeals, as is apparent from the several opinions, it was not contended by the Commissioner that the payments in question were not made "pursuant to the terms of the . . . deed creating the trust" within the meaning of §162 (a) of the Revenue Act of 1928 and the hearing proceeded on the footing that they were so made. The question considered was whether it was necessary for the trustee, in order to enjoy the benefit of the deduction, to show that the payments were made out of income received during the year in which they were made. The Board unanimously held that the payments in question were not made out of principal (R. 64, 66). The majority held that, in view of the possibility that accumulated income might in some future year be used for annuity payments, the income received by the trust during 1931 and not required for expenses or for the annuity payments of that year did not constitute income "to be used exclusively" for charitable purposes within the meaning of the statute and that, as regards sums actually paid to charitable institutions during 1931, it was incumbent upon the trustee to prove affirmatively that the sums in question were paid out of income received in the same year; it was said that "the deduction is based upon the use of the income subject to tax and not upon the use of accumulated income of prior years" (R. 64). The majority found that contributions aggregating $2,007.57 were indubitably made from the gross income of 1931 and might, therefore, be claimed as deductions, but held that as to the balance of the contributions in question (aggregating $187,999.43) the trustee had not sustained the burden of proof and that in consequence this balance was not deductible; according to the majority the Board had no way of determining how much of the payments in excess of $2,007.57 "might have been made from 1931 income and how much from prior accumulations" (R. 65). The minority, without undertaking to determine

whether the income in question was "to be used exclusively" for charitable purposes, held in substance that the deduction should be allowed on the ground that payments which are as between the trustee and the beneficiary properly chargeable against the amounts constituting for tax purposes the gross income of the trust are to be allowed as deductions and that it is immaterial whether the trustee takes the money so applied out of income actually received during the current year or takes it out of income on hand at the beginning of the year and suffers the income thereafter received to accumulate (R. 66).

Both parties petitioned the Circuit Court of Appeals for the First Circuit to review the decision of the Board of Tax Appeals. The trustee assigned as error the Board's holdings "that gifts made to charities in 1931 were not deductible unless shown to have been made from gross income received by the trust in that year" and "that the difference between the petitioner's net income for 1931 as determined by the respondent and the amounts paid to annuitants was . . . [not] to be used exclusively for charitable purposes within the meaning of Section 162 (a) of the Revenue Act of 1928" (R. 74). The Commissioner assigned as error the Board's failure to hold "that the amount of $2000.57 was paid out of the corpus of the estate created under the trust indenture" (R. 82); in no assignment of error was it suggested that the payments in question were not made "pursuant" to the terms of the trust instrument within the meaning of the statute. The docket numbers of the two cases in the Circuit Court of Appeals are 3145 and 3146 respectively.

At the hearing in the Circuit Court of Appeals the Commissioner put forward as his principal reliance a contention that none of the contributions, even if unquestionably made out of income received during the same year, were deductible, because the deed did not imperatively require

them to be made but gave the trustees power to make them as a matter of discretion; it was said that for this reason the payments could not be deemed to have been made "pursuant to the terms of the . . . deed creating the trust." The trustee argued that the Board of Tax Appeals rightly proceeded on the assumption that the words "pursuant to" were to be taken in their normal sense of "agreeably to" or "in accordance with"; as to the points considered by the Board the trustee reiterated in substance its former arguments.

The majority of the Circuit Court of Appeals, while overruling the Commissioner's contention that the payment of $2,000.57 above mentioned was not made from income, sustained his contention as to the meaning of the words "pursuant to" and, without passing upon the question upon which the Board of Tax Appeals had been divided, ordered the case remanded to the Board with instructions to reinstate the Commissioner's determination *in toto* (R. 87, 95). Judge Morton filed a dissenting opinion (R. 92).

Specification of Errors.

Since the point on which the case chiefly turned in the Circuit Court of Appeals was not considered by the Board of Tax Appeals and was not referred to the assignments of error filed with the respective petitions for review, a repetition of these assignments would be unprofitable. The petitioner's objections to the decision of the Circuit Court of Appeals may, however, be summarized as follows:—

1. The Circuit Court of Appeals erred in holding that the contributions made during 1931 were not deductible as payments made for charitable purposes pursuant to the terms of the trust instrument:—

(*a*) Because there is no warrant for taking the words "pursuant to the terms of the . . . deed creating the trust,"

as used in §162 (a) of the Revenue Act of 1928, to mean "as imperatively required by the terms of the deed," instead of taking these words in their normal sense of "agreeably to the terms of the deed" or "conformably to the terms of the deed";

(*b*) Because, as was held by the minority of the Board of Tax Appeals, it was not incumbent on the trustee to prove affirmatively that the funds used in making the contributions in question were the identical funds received during the taxable year.

2. The Circuit Court of Appeals further erred in not sustaining the trustee's contention that, if the contributions made during 1931 were not deductible as sums paid during the taxable year for charitable purposes "pursuant to the terms of the deed," the income received in 1931 was on any theory "to be used exclusively" for charity within the meaning of the statute, the existence of a discretionary power on the part of the trustee to draw upon accumulated income to meet future annuity payments being immaterial for this purpose.

Argument.

For a summary of the argument which follows, the petitioner begs leave to refer to subdivision 13 of the petition for certiorari (pp. 6-9, *supra*).

I.

THE CONTRIBUTIONS MADE DURING 1931 WERE DEDUCTIBLE AS PAYMENTS MADE FOR CHARITABLE PURPOSES PURSUANT TO THE TERMS OF THE TRUST INSTRUMENT.

1. The Construction given by the Majority of the Circuit Court of Appeals to the Words "Pursuant to the Terms of the Will or Deed creating the Trust" is manifestly wrong.

The importance of this question is obvious. The court will take notice of the fact that there are great numbers of trust instruments in which it is left to the discretion of the trustees to apply the income either to charitable or to non-charitable purposes as they may from time to time determine. The effect of the decision is that, although an individual who elects to make contributions to charity is allowed a deduction equal to 15 per cent. of his net income,—or even to a greater extent in certain cases; see §120 of the Revenue Act of 1928,—the income of a trust created by such an instrument is taxable without deduction even if the whole amount is contributed to charity. This result is so anomalous that it cannot in the absence of most positive language be supposed to have been the intention of Congress.

As this court has often recognized,—*e.g.*, in *Lederer* v. *Stockton*, 260 U.S. 3,—the successive revenue acts have disclosed a policy of encouraging contributions to charity by permitting such contributions to be deducted and the provisions for deductions of this class have been progres-

sively more liberal. The individual may, of course, "do what he will with his own"; in order to induce him to apply a part of his income to charity, he is allowed a deduction on account of contributions within specified limits. It is well-nigh inconceivable that, when Congress came to deal with contributions by trust estates, it should have intended to reverse this policy and to offer a trustee having power to apply income to charity no inducement whatever to do so. In any event, no such intent can be attributed to Congress when it can be read into the statute only by disregarding the normal meaning of the words and taking them in a strained and unnatural sense.

Lincoln v. *Ricketts*, 297 U.S. 373, 376.

Any such departure from the ordinary meaning of the words is peculiarly obnoxious in construing a provision intended to encourage gifts to charity.

Helvering v. *Bliss*, 293 U.S. 144, 150.

That the meaning given by the Circuit Court of Appeals to the words "pursuant to" is not that which the words normally carry is suggested by the fact that it appears never to have occurred to the Commissioner, when assessing the tax, or to the Board of Tax Appeals that they might be so construed. As already pointed out, the Commissioner's denial of the deduction was put on an entirely different ground (R. 12). While the arguments before the Board of Tax Appeals are not in the record, it is patent that no such contention was made before the Board; although the Board was sharply divided upon another aspect of the case, each of the three opinions proceeds without discussion upon the assumption that the payments in question were made "pursuant to" the terms of the deed. It is, indeed, only upon a very liberal construction of the rule

applied in *General Utilities & Operating Co.* v. *Helvering*, 269 U.S. 200, that it can be said to have been competent for the Commissioner under his general assignment of error,—"the Board erred in holding that the taxpayer was entitled to a deduction from gross income for the year 1931 of an amount of $2,000.57 paid to charitable organizations" (R. 82),—to argue that the payments were not made "pursuant to" the terms of the deed; even if the argument was open, the frame of the several assignments shows clearly that no such idea was in the mind of counsel when they were prepared. The decision of the Circuit Court of Appeals, therefore, is in effect that a construction so recondite that it did not occur to anybody prior to the argument before that court must be adopted in the face of the overwhelming probability that the intention of Congress was just the contrary.

The word "pursuant" is in such common use that the citation of authorities as to its meaning is almost superfluous. A few references, however, may be permissible. Thus in Webster's New International Dictionary (2d Ed.) p. 2018, "pursuant" is defined as follows:—

> "Acting or done in consequence of or in prosecution (of anything); hence, agreeable; conformable; following; according;—with *to* or *of*."

The definition in the New Standard Dictionary, p. 2014, is similar:—

> "In accordance; agreeably; conformably; usually with *to*."

So, in Black's Law Dictionary (3d Ed.) p. 1469, "pursuant" is defined as "conformable to, agreeable to, or in accordance with."

To settle the present question it is hardly necessary to do more than to ask what the meaning of the statute would be

if, instead of the words "pursuant to," it used one of the terms thus recognized by the dictionaries as synonymous. If, for example, the statute spoke of contributions made "agreeably" to the terms of the trust instrument, no one would imagine that a contribution authorized by the trust instrument was not made "agreeably" to its terms, even if not imperatively required. The same would be true if the statute spoke of contributions made "in accordance with" or "conformably to" the terms of the instrument.

If carried out consistently, the meaning given by the majority of the Circuit Court of Appeals to the words "pursuant to" would, indeed, lead to surprising results. For example, the Constitution of the United States (Article VI) provides that "this Constitution, and the laws of the United States which shall be made in pursuance hereof, . . . shall be the supreme law of the land." No one has ever suggested that the "laws of the United States" thus referred to are only those which it is the imperative duty of Congress to enact; it has always been assumed that "made in pursuance thereof" is equivalent to "made in the exercise of authority conferred thereby." If the decision of the Circuit Court of Appeals is right, however, this fundamental provision has only a very narrow operation; an act passed by Congress in the exercise of discretion is not "the supreme law of the land," but may be overridden by the States *ad libitum*.

The general concurrence of the courts in the views of the lexicographers appears from the decisions cited by Judge Morton in his dissenting opinion. The meaning attached by the majority of the Circuit Court of Appeals to the crucial words is, on the other hand, without support either in reason or in authority. As is pointed out in the dissenting opinion, nearly all the decisions relied upon by the majority dealt with language wholly unlike that now in question and have no bearing on the present issue.

Bowers v. *Slocum*, 20 Fed. (2d) 350, which is cited in the majority opinion, arose under §219 of the Revenue Act of 1918 (corresponding to §162 of the Revenue Act of 1928), but raised an issue entirely different from that now presented, *i.e.*, whether, if the trust instrument unequivocally directed that certain income be devoted to charity, the failure of the trustees to pay over such income or make appropriate entries in their books affected the right to claim a deduction; no question as to the exercise of a discretion given by the trust instrument was involved.

The majority of the Circuit Court of Appeals quote from the opinion of the District Court for the Western District of Kentucky in *Charles P. Moorman Home for Women* v. *United States*, 42 Fed. (2d) 257, language which may seem at first sight to support their conclusion. Upon examination, however, it will be found that in the *Moorman* case no payments to charity had actually been made during the taxable year; the income, so far as not required for the support of the life tenant, had simply been allowed to accumulate. As the judge construed the will, it was not competent for the trustee irrevocably to devote these accumulations to charity before the death of the life tenant, whose support constituted a first charge both on the income and on the principal. Thus the action of the trustee in assuming to earmark the unexpended income as appropriated to charity was merely officious. That the judge was not referring to a case like the present,—in which the trust instrument expressly gives the trustee authority to make outright gifts to charity in its discretion,—is shown by the following language (p. 260):—

> "As I view the law, if the instrument creating the trust clearly provides that the income of the trust as it accrues each taxable year shall be paid or permanently set aside to the charitable corporation, it will be exempt from taxation for each of the taxable years, notwith-

> standing the trustee may have failed or neglected either to pay it or permanently set it aside. On the other hand, if it appears from the instrument creating the trust that it was not the intention of the creator that any part of the income of the trust should be paid to or permanently set aside for the charitable corporation during the taxable year, the action of the trustee in paying or setting aside same during that year would not operate to exempt it from taxation."

It is thus patent that the language which precedes this passage and which is quoted by the majority of the Circuit Court of Appeals (R. 89) simply means that a payment may not be deemed to have been made "pursuant" to the trust instrument if not contemplated by the instrument, but made by the trustee *suo motu;* in 4 Paul and Mertens on Federal Income Taxation, § 34.60, it is so interpreted. It is hardly necessary, moreover, to suggest that, even if not thus susceptible of ready explanation, the opinion of a single district judge would be a slender foundation upon which to rest a decision which is right in the teeth of all the other authorities; the opinion has been examined in order to show that the position of the majority in the case at bar has not even this slight support.

The case, therefore, presents an interpretation of an important federal statute contrary to all the authorities and to the manifest intention of Congress. The decision of the Circuit Court of Appeals means that the many trust estates established by instruments giving a discretionary power to apply income to charity must pay a tax on their entire income, even if every cent of it is actually and irrevocably paid over to charitable institutions during the year in which it is received. That the consequences of such a decision must be serious needs no argument. A review by this court is plainly called for.

2. The Majority of the Board of Tax Appeals erred in holding that the Taxpayer must affirmatively prove that the Payments in Question were actually made out of Money received during 1931 and not from accumulated Income on Hand at the Beginning of the Year.

As already pointed out, the proceedings before the Board of Tax Appeals were based on the assumption that the payments in question were made "pursuant" to the terms of the trust instrument. The Board had, moreover, no difficulty in finding that these payments were made out of income. The only reason why the deduction claimed by the taxpayer was not allowed in full was because it did not appear (except as to $2,000.57) that the actual money paid to charitable institutions during 1931 was taken from income received during that year and not from income accumulated at the beginning of the year. The majority of the Board stated as follows their theory as to the decisive issue (R. 64):—

> "The question is, How much, if any, of the gross income of 1931 was paid to the charities in 1931 and thus used for charitable purposes pursuant to the terms of the deed creating the trust within the meaning of section 162 (a)? The deduction is based upon the use of the income subject to tax and not upon the use of accumulated income of prior years."

This is the same as saying that whether payments to charity are allowable as deductions depends, so to speak, upon the particular pocket out of which the trustee elects to take the money actually paid over. If carried to its logical conclusion this would mean that a trustee could obtain the benefit of the deduction only if he kept the net income of each year in cash or its equivalent in a separate box or bank account and made all contributions out of that fund. The effect is to render the provision for deduction worthless

to a trust estate conducted in the ordinary way; it is patent that the practical exigencies of such an estate must often make it necessary to carry over income from one year to another and impossible to determine whether a particular payment is made from the income of the current year. The seriousness of this question to all trust estates is apparent.

The objections to such an ultra-literal and unreasonable interpretation of the statute are pointed out in the dissenting opinion of Board Member Smith (R. 65-66), which states the matter so clearly that little can be added. As he observes, the result is altogether out of harmony with the view expressed by this court in *Lederer* v. *Stockton*, 260 U.S. 3, *i.e.*, that the favor which Congress intended to extend to charitable gifts is not to be defeated by the mere form of the transaction. That the views of the majority are open to question further appears from the comment on the decision by Messrs. Paul and Mertens (4 Law of Federal Income Taxation, Supplement of 1936, p. 32; italics supplied):—

> "*Note 96.* In *Old Colony Trust Co., Trustee*, 33 B.T.A. 311, it is said that 'The deduction is based upon the use of the income subject to tax and not upon the use of accumulated income of prior years,' the decision suggesting that the payments must be from the gross income of the taxable year. The trustees had power to make the payments from corpus, accumulated income or excess current earnings in any particular year. Disallowance of a deduction for a payment actually made was not refused on the ground that the provisions of the trust instrument did not require the payments to be made out of income, but for the reason that the trustees had not clearly shown what part of the payment was made from current income. Four members dissented. *There is much force in the position of the minority.*"

There is, indeed, no difficulty in taking "any part of the gross income . . . , which . . . is during the taxable year paid or permanently set aside," etc., as meaning that payments which are as between trustee and beneficiary properly chargeable against the amounts constituting for tax purposes the gross income of the trust are to be allowed as deductions. It must be assumed that Congress in enacting §162 (a) took notice of the manner in which trust estates are commonly administered and did not intend to make the exemption depend upon the trustee's making a segregation which would never be made in ordinary accounting practice. It is likewise to be assumed that Congress had no purpose to establish a purely arbitrary distinction and to cause the right to claim the deduction to hinge on a mere accidental circumstance having no relation to a policy which has run through the income tax laws from the beginning.

It is further to be noted that the deduction allowed to individuals on account of contributions to charity is in no way conditioned upon the source from which the contributions are taken. It is recited in §162 (a) that "there shall be allowed as a deduction (*in lieu of the deduction for charitable, etc., contributions authorized by section 23* [*n*]) any part of the gross income, *without limitation,*" etc. (Italics supplied.) It would surely be a strange thing to allow to estates and trusts "in lieu" of the limited deduction allowed individuals a deduction which purported to be "without limitation," but which was so restricted in another particular as often to be worthless.

The petitioner submits that this question, like that arising with respect to the construction of the words "pursuant to," is of importance to all trustees and calls for determination by the court of last resort.

II.

IF THE PAYMENTS IN QUESTION ARE DISREGARDED, THE RECEIPTS OF THE TRUST FOR 1931 (ABOVE THE AMOUNTS REQUIRED TO PAY ANNUITIES AND EXPENSES) CONSTITUTED INCOME "TO BE USED EXCLUSIVELY" FOR CHARITABLE PURPOSES.

There can be no pretence that the income of 1931, after deducting the sums necessary to meet the annuities and expenses of that year, was applied through any act of the trustee to non-charitable purposes. If it be assumed for the sake of argument that, either for the reason given by the majority of the Board of Tax Appeals or for that assigned by the majority of the Circuit Court of Appeals, the payments are not allowable as deductions, the case must stand as if those payments had not been made and as if the sums in question had been retained by the trustee. On this assumption the question is whether these sums constituted income "to be used exclusively" for charitable purposes within the meaning of the statute.

It will doubtless be conceded by the respondent that, if under the terms of the trust instrument it was necessary that these sums be eventually applied to charity, the fact that they were not paid over during the taxable year would not be material. As the case actually stands, the entire trust property,—both principal and income,—is charged with a charitable use, subject to the condition subsequent that either principal or accumulated income may be used in the discretion of the trustee to meet annuity payments. In this aspect, therefore, the case raises a question as to which the Circuit Court of Appeals for the First Circuit and the Circuit Court of Appeals for the Second Circuit are in conflict. In the Second Circuit it has been held that, if the terms of the trust instrument are such that the income, as received, is charged with a charitable use, the

existence of a condition subsequent whereby the sums in question may possibly be diverted to a non-charitable purpose does not prevent such sums from constituting income "to be used exclusively" for charitable purposes within the meaning of the statute.

Hartford-Connecticut Trust Co. v. *Eaton*, 36 Fed. (2d) 710, affirming 29 Fed. (2d) 840.

This decision has been followed by the District Court for the District of Connecticut in *Hartford-Connecticut Trust Co.* v. *Eaton*, 41 Fed. (2d) 69.

In the First Circuit the position has been taken in *Boston Safe Deposit & Trust Co.* v. *Commissioner of Internal Revenue*, 66 Fed. (2d) 179, and again in the case at bar that, even if a charitable use attaches to the income when received, it cannot be regarded as constituting income "to be used exclusively" for charitable purposes so long as there remains a possibility that it may be diverted to other purposes through the operation of a condition subsequent. That this position was not assumed without appreciation of its inconsistency with that adopted in the Second Circuit appears from the express language of the opinion in *Boston Safe Deposit & Trust Co.* v. *Commissioner of Internal Revenue*, *supra* (at p. 184):—

> "We think the words 'or to be used' have no such significance as was given them in *Hartford-Connecticut Trust Co.* v. *Eaton* [36 Fed. (2d) 710]."

As showing the unsoundness of the view taken in the First Circuit, the petitioner begs leave to quote from the opinion of Board Member Smith in the present case (R. 66):—

> "It is further to be noted that the entire income of the trust fund was to be paid to charitable and other organizations referred to in section 23 (n) after the

payment of expenses and annuities. If the trust fund is required to pay the tax determined by the board in this case, the payment impinges upon the amount which would otherwise go to charities. In my opinion this was never contemplated by Congress."

It is further to be observed that, in the case at bar, the doctrine enunciated in *Boston Safe Deposit & Trust Co.* v. *Commissioner of Internal Revenue* has been carried to an extravagant length. The capital value of the annuities in 1931 represented only a small fraction of the entire trust property. The gross income for that year,—which was, of course, at the bottom of the depression,—was almost eight times the total of the annuity payments. Most of the annuitants were persons of advanced age, so that the aggregate of these payments tended steadily to diminish (R. 27). The possibility that the current income would so fall off as to make it necessary to draw either on the principal or on accrued income to keep up the annuity payments was thus so slight as to be purely theoretical. This court has repeatedly held that, even if a real prospect of diversion would be material in determining the incidence of a tax, a possibility as remote as this must be disregarded.

Ithaca Trust Co. v. *United States*, 279 U.S. 151.
Cochran v. *United States*, 254 U.S. 387.
Simpson v. *United States*, 252 U.S. 547.
Henry v. *United States*, 251 U.S. 393.

The respective Circuit Courts of Appeals for the Second Circuit and for the Fifth Circuit have applied this principle to facts much like those now presented.

Humphrey v. *Millard*, 79 Fed. (2d) 107, affirming 8 Fed. Supp. 784.
First National Bank of Birmingham v. *Snead*, 24 Fed. (2d) 186.

The case at bar thus presents an issue upon which the decisions in different circuits are in conflict and upon which the decision sought to be reviewed is inconsistent with the opinions of this court. Such a decision peculiarly demands examination.

FRANCIS V. BARSTOW.
HAROLD S. DAVIS.

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Supreme Court of the United States.

OCTOBER TERM, 1936.

No. 703.

OLD COLONY TRUST COMPANY, TRUSTEE,
PETITIONER,

v.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

BRIEF FOR THE PETITIONER.

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TABLE OF CONTENTS.

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statement	4
Specification of Errors	10
Summary of Argument	11
Argument	13
I. The Contributions made during 1931 were Deductible as Payments made for Charitable Purposes pursuant to the Terms of the Trust Instrument	13
1. The Construction given by the Majority of the Circuit Court of Appeals to the Words "Pursuant to the Terms of the Will or Deed creating the Trust" is manifestly wrong	13
2. The Majority of the Board of Tax Appeals erred in holding that the Taxpayer must affirmatively prove that the Payments in Question were actually made out of Money received during 1931 and not from accumulated Income on Hand at the Beginning of the Year	24
II. If the Payments in Question are disregarded, the Receipts of the Trust for 1931 (above the Amounts required to pay Annuities and Expenses) constituted Income "to be used exclusively" for charitable Purposes	28

TABLE OF CITATIONS.

Cases.

	Page
Bartlett, petitioner, 163 Mass. 509	38
Binney v. Long, 299 U.S. 280	30, 31
Blair v. Commissioner, 299 U.S. — (Feb. 1, 1937)	37
Boston Safe Deposit & Trust Co. v. Commissioner, 66 F. (2d) 179	20, 30
Bowers v. Slocum, 20 F. (2d) 350	22
Boyden v. Stevens, 285 Mass. 176	40
Brigham v. Peter Bent Brigham Hospital, 134 Fed. 513	39
Burnet v. Whitehouse, 283 U.S. 148	22
Charles P. Moorman Home for Women v. United States, 42 F. (2d) 257	22
Cochran v. United States, 254 U.S. 387	34, 37
Codman v. Brigham, 187 Mass. 309	39
Coolidge v. Long, 282 U.S. 582	30, 31
Corkery v. Dorsey, 223 Mass. 97	40
Cummings v. Cummings, 146 Mass. 501	36
DeGanay v. Lederer, 250 U.S. 376	19
Dexter v. Episcopal City Mission, 134 Mass. 394	38
First National Bank of Boston v. Truesdale Hospital, 288 Mass. 35	32
General Utilities & Operating Co. v. Helvering, 296 U.S. 200	14
Guaranty Trust Co. v. Commissioner, 31 B.T.A. 19	20, 21
Guffey v. Smith, 237 U.S. 101	37
Hartford-Connecticut Trust Co. v. Eaton, 36 F. (2d) 710 (affirming 29 F. [2d] 840)	12, 29
Hartford-Connecticut Trust Co. v. Eaton, 41 F. (2d) 69	29
Helvering v. Bliss, 293 U.S. 144	14
Helvering v. Pardee, 290 U.S. 365	21

	Page
Henry v. United States, 251 U.S. 393	33
Hughes v. Buckland, 15 M. & W. 346	17
Ithaca Trust Co. v. United States, 279 U.S. 151	31
Kent v. Great Western Ry. Co., 3 C.B. 714	17
Kirwin v. Attorney General, 275 Mass. 34	39
Lawless v. Sullivan, 6 A.C. 373	19
Lederer v. Stockton, 260 U.S. 3	13, 26
Lincoln v. Ricketts, 297 U.S. 373	14
Miller v. Robertson, 266 U.S. 243	19
Minot v. Baker, 147 Mass. 348	39
Mississippi Valley Trust Co. v. Commissioner, 72 F. (2d) 197	21
Ocean Coal Co. v. Davies, [1927] A.C. 271	18
Old Colony Railroad Co. v. Commissioner, 284 U.S. 552	19
Portland, The, 273 Fed. 401	19
Potter v. Realty Securities Co., 77 Fla. 768	18
Saltonstall v. Sanders, 11 Allen, 446	39
Sears v. Hardy, 120 Mass. 524	38
Simpson v. United States, 252 U.S. 547	34
Tax Commissioner v. Putnam, 227 Mass. 522	36
Tirrell v. Commissioner of Corporations & Taxation, 287 Mass. 464	36
Treadwell v. Cordis, 5 Gray, 341	38
Tyler v. United States, 281 U.S. 497	37
Waterhouse v. Keen, 4 B. & C. 200	17
Weber v. Bryant, 161 Mass. 400	39
Williams v. Bradley, 3 Allen, 270	39
Williams v. Milton, 215 Mass. 1	36
Williams v. Thacher, 186 Mass. 293	38
Wilson v. Wilson, 145 Mass. 490	39

Textbooks.

	Page
Black's Law Dictionary (3d Ed.)	15
New Standard Dictionary	15
Paul and Mertens on Federal Income Taxation	24, 26
Webster's New International Dictionary (2d Ed.)	15

Constitution of the United States.

Article VI	16

Statutes.

Judicial Code, §240 (as amended by the Act of February 13, 1925, c. 229, §1, 43 Stat. 938)	2
Revenue Act of 1918, §219	22
Revenue Act of 1918, §403 (a) (3)	31
Revenue Act of 1928, §23	2n.
Revenue Act of 1928, §120	13
Revenue Act of 1928, §162	2, 22
Revenue Act of 1928, §162 (a)	2, 6, 7, 10, 12, 26, 27
Revenue Act of 1928, §162 (b)	3
Revenue Act of 1928, §162 (c)	3, 19
U.S. Code, Title 28, §347 (a)	2
Workmen's Compensation Act, 1923 (13 & 14 Geo. 5, c. 42) §14	18

Supreme Court of the United States.

OCTOBER TERM, 1936.

No. 703.

OLD COLONY TRUST COMPANY, TRUSTEE,
PETITIONER,
v.
COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

BRIEF FOR THE PETITIONER.

This court on March 15, 1937, granted a writ of certiorari to review a decision (R. 84) rendered on December 10, 1936, by the United States Circuit Court of Appeals for the First Circuit upon cross-petitions for the review of a decision of the Board of Tax Appeals.

Opinions Below.

The majority and minority opinions of the Board of Tax Appeals are reported in 33 B.T.A. 311; those of the Circuit Court of Appeals are found in 87 F. (2d) 131.*

* The dissenting opinion of Judge Morton, as it appears in the Federal Reporter, was evidently printed from an uncorrected copy. The third sentence of the second paragraph should read "The majority opinion holds," etc., instead of "The Board of Tax Appeals held" (R. 83).

Jurisdiction.

This court has jurisdiction to review the decision of the Circuit Court of Appeals under 28 U.S.C. §347 (a) (Judicial Code, §240, as amended by the Act of February 13, 1925, c. 229, §1, 43 Stat. 938).

Questions Presented.

As will be seen from the several opinions of the Board of Tax Appeals and of the Circuit Court of Appeals, the case turns upon the construction of Section 162 of the Revenue Act of 1928, which in its material part is as follows:—

> "*Sec. 162. Net income.* The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—
>
> "(*a*) There shall be allowed as a deduction (in lieu of the deduction for charitable, etc., contributions authorized by section 23 [n]*) any part of the gross income, without limitation, which pursuant to the terms of the will or deed creating the trust, is during the taxable year paid or permanently set aside for the

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* The material part of §23 of the Revenue Act of 1928 is as follows:—

"In computing net income there shall be allowed as deductions:

• • • • • • • • •

"(*n*) *Charitable and other contributions.*—In the case of an individual, contributions or gifts made within the taxable year to or for the use of:

"(1) the United States, any State, Territory, or any political subdivision thereof, or the District of Columbia, for exclusively public purposes;

"(2) any corporation, or trust, or community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings

purposes and in the manner specified in section 23 [n], or is to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, or for the establishment, acquisition, maintenance or operation of a public cemetery not operated for profit;

"(*b*) There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, and the amount of the income collected by a guardian of an infant which is to be held or distributed as the court may direct, but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not. Any amount allowed as a deduction under this paragraph shall not be allowed as a deduction under subsection [c] of this section in the same or any succeeding taxable year;

"(*c*) In the case of income received by estates of deceased persons during the period of administration or settlement of the estate, and in the case of income which, in the discretion of the fiduciary, may be either distributed to the beneficiary or accumulated, there shall be allowed as an additional deduction in comput-

---

of which inures to the benefit of any private shareholder or individual;

* * * * * * * * * *

to an amount which in all the above cases combined does not exceed 15 per centum of the taxpayer's net income as computed without the benefit of this subsection. Such contributions or gifts shall be allowable as deductions only if verified under rules and regulations prescribed by the Commissioner, with the approval of the Secretary. (For unlimited deduction if contributions and gifts exceed 90 per centum of the net income, see section 120.)"

ing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is properly paid or credited during such year to any legatee, heir, or beneficiary, but the amount so allowed as a deduction shall be included in computing the net income of the legatee, heir, or beneficiary."

The issue is whether, in computing the net income of the petitioner for 1931 as trustee under the deed of trust referred to below, the petitioner is entitled to a deduction equal to the excess of income over the sums required to pay the expenses and certain annuities either (*a*) because the trustee during the same year made contributions out of income to charitable purposes aggregating more than this excess or (*b*) because the entire excess was in view of the terms of the trust "to be used exclusively" for charitable purposes.

Statement.

The facts were stipulated before the Board of Tax Appeals (R. 18-50) and are in substance as follows:—

Paul Wilde Jackson, by a deed dated July 19, 1922 (R. 24) transferred to the Old Colony Trust Company and George E. Brock (who died in 1923, leaving the Old Colony Trust Company sole trustee) property of large value in trust to make various outright payments not now material (R. 23, 51) and to pay annuities in specified amounts to various individuals. The deed then continued as follows (R. 29):—

"13. I authorize my said trustees to pay to charities as hereinafter described such sums as in their judgment may be paid without jeopardizing the annuities herein provided for, whenever for a period of one year the trust fund held by them as then invested shall have

yielded a net income equal to twice the amount of the annuities which they are then required to pay, and upon the death of the survivor of those persons, who under the terms of this instrument are to receive annual incomes under the trust hereby created, I direct my said trustees to distribute the rest and residue remaining in their hands among corporations and trustees organized, operating and holding exclusively for religious, charitable, scientific, literary or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, the sum paid over by said trustees to such corporations or boards of trustees to be held by such corporations and boards of trustees in trust, and the income thereof to be expended for the general purposes for which such corporations and boards of trustees are organized, and I request that said funds be designated by each corporation or board of trustees as the Henry Clay Jackson Fund."

According to the introductory recitals of the deed, the settlor's purpose was to carry out the wishes of his brother Henry Clay Jackson, who had been prevented by death from executing a will and from whom the settlor had inherited the property in question (R. 24; see also the letter of Arthur T. Johnson, Esq., who was Henry Clay Jackson's legal adviser, R. 46).

The income of the trust for each year since the petitioner has held the prinicpal has been more than twice the aggregate of the annuity payments required in such year by the terms of the trust (R. 20).

The first receipt of principal by the petitioner under the trust was on May 29, 1923, and upon that date separate ledger sheets for the principal and for the income were opened. The first receipt of income was on June 30, 1923.

The principal (corpus) account has always been maintained separate and apart from the income account. No annuity payments or payments to charitable organizations have been charged on the books to the principal account (R. 20). The trustee's returns have been made upon a cash receipts and disbursements basis (R. 24, 54).

The market value of the trust corpus was $2,119,835.81 on January 1, 1931, and $1,488,140.43 on December 31, 1931 (R. 22). The accumulated income on hand January 1, 1931, was $187,999.43 (R. 54).

The gross income for the year 1931, exclusive of gains, was found by the Board of Tax Appeals to have been $114,417.36 (R. 54). The Board found that in the same year the trust received from the sale of securities income of $60,901.82 (R. 54). The gross income of the trust for 1931 therefore amounted in all to $175,319.18, whereas the total of the annuities distributed or distributable in that year was $22,900 (R. 54). Deducting from this total $22,350 (which was the amount actually paid out during 1931 on account of the annuities) and $11,029.79 on account of expenses there remained a balance of $141,939.39 available for charities (R. 54, 59).

During the year 1931 the trustee paid to various institutions (each of which was admittedly charitable within the meaning of §162 [a] of the Revenue Act of 1928) a total of $190,000, all of these payments being shown in the books of the trust as payments out of income (R. 21-22, 54).

The cost of procuring annuities for all of the annuitants, if purchased during the first six months of 1931 from the New York Life Insurance Company, would have been $200,804.33 (R. 23, 54).

The petitioner filed a fiduciary return for 1931 showing income apportioned to the annuitants and to itself (R. 19). It also filed an individual return for the same year in which it claimed as deductions on account of sums set

aside for charitable and religious purposes amounts equal in the aggregate to the total net income, including capital gains (R. 19). The Commissioner disallowed all these deductions (R. 20). The sole reason assigned by the Commissioner for disallowing deductions on account of the sums applied to charity was that it was "not disclosed that payments were made out of income of the taxable year to the charities nor that any portion of the income was credited to any charity" (R. 11).

At the hearing before the Board of Tax Appeals, as is apparent from the several opinions, it was not contended by the Commissioner that the payments in question were not made "pursuant to the terms of the . . . deed creating the trust" within the meaning of §162 (a) of the Revenue Act of 1928 and the hearing proceeded on the footing that they were so made. The question considered was whether it was necessary for the trustee, in order to enjoy the benefit of the deduction, to show that the payments were made out of income received during the year current. The Board unanimously held that the payments in question were not made out of principal (R. 57, 59).

The majority held that, in view of the possibility that accumulated income might in some future year be used for annuity payments, the income received by the trust during 1931 and not required for expenses or for the annuity payments of that year did not constitute income "to be used exclusively" for charitable purposes within the meaning of the statute and that, as regards sums actually paid to charitable institutions during 1931, it was incumbent upon the trustee to prove affirmatively that the sums in question were paid out of income received in the same year; it was said that "the deduction is based upon the use of the income subject to tax and not upon the use of accumulated income of prior years" (R. 58). The majority found that contributions aggregating $2,007.57 were in-

dubitably made from the gross income of 1931 and might, therefore, be claimed as deductions, but held that as to the balance of the contributions in question (aggregating $187,999.43) the trustee had not sustained the burden of proof and that in consequence this balance was not deductible; according to the majority the Board had no way of determining how much of the payments in excess of $2,007.57 "might have been made from 1931 income and how much from prior accumulations" (R. 58).

The minority, without undertaking to determine whether the income in question was "to be used exclusively" for charitable purposes, held in substance that the deduction should be allowed on the ground that payments which are as between trustee and beneficiary properly chargeable against the amounts constituting for tax purposes the gross income of the trust are to be allowed as deductions and that it is immaterial whether the trustee takes the money so applied out of income actually received during the current year or takes it out of income on hand at the beginning of the year and suffers the income thereafter received to accumulate (R. 59).

Both parties petitioned the Circuit Court of Appeals for the First Circuit to review the decision of the Board of Tax Appeals. The trustee assigned as error the Board's holdings "that gifts made to charities in 1931 were not deductible unless shown to have been made from gross income received by the trust in that year" and "that the difference between the petitioner's net income for 1931 as determined by the respondent and the amounts paid to annuitants was . . . [not] to be used exclusively for charitable purposes within the meaning of Section 162 (a) of the Revenue Act of 1928" (R. 67). The Commissioner assigned as error the Board's failure to hold "that the amount of $2000.57 was paid out of the corpus of the estate created under the trust indenture" (R. 74); in no assignment of error was it

suggested that the payments in question were not made "pursuant" to the terms of the trust instrument within the meaning of the statute.

At the hearing in the Circuit Court of Appeals the Commissioner put forward as his principal reliance a contention that none of the contributions, even if unquestionably made out of income received during the same year, were deductible, because the deed did not imperatively require them to be made but gave the trustees power to make them as a matter of discretion; it was said that for this reason the payments could not be deemed to have been made "pursuant to the terms of the . . . deed creating the trust." The trustee argued that the Board of Tax Appeals rightly proceeded on the assumption that the words "pursuant to" were to be taken in their normal sense of "agreeably to" or "in accordance with"; as to the points considered by the Board the trustee reiterated in substance its former arguments.

The majority of the Circuit Court of Appeals, while overruling the Commissioner's contention that the payment of $2,000.57 above mentioned was not made from income, sustained his contention as to the meaning of the words "pursuant to" and, without passing upon the question upon which the Board of Tax Appeals had been divided, ordered the case remanded to the Board with instructions to reinstate the Commissioner's determination *in toto* (R. 77, 84). Judge Morton filed a dissenting opinion (R. 82).

Specification of Errors.

Since the point on which the case chiefly turned in the Circuit Court of Appeals was not considered by the Board of Tax Appeals and was not referred to in the assignments of error filed with the respective petitions for review, a repetition of these assignments would be unprofitable. The petitioner's objections to the decision of the Circuit Court of Appeals may, however, be summarized as follows:—

1. The Circuit Court of Appeals erred in holding that the contributions made during 1931 were not deductible as payments made for charitable purposes pursuant to the terms of the trust instrument:—

(*a*) Because there is no warrant for taking the words "pursuant to the terms of the . . . deed creating the trust," as used in §162 (a) of the Revenue Act of 1928, to mean "as imperatively required by the terms of the deed," instead of taking these words in their normal sense of "agreeably to the terms of the deed" or "conformably to the terms of the deed";

(*b*) Because, as was held by the minority of the Board of Tax Appeals, it was not incumbent on the trustee to prove affirmatively that the funds used in making the contributions in question were the identical funds received during the taxable year.

2. The Circuit Court of Appeals further erred in not sustaining the trustee's contention that, if the contributions made during 1931 were not deductible as sums paid during the taxable year for charitable purposes "pursuant to the terms of the deed," the income received in 1931 was on any theory "to be used exclusively" for charity within the meaning of the statute, the existence of a condition subsequent whereby accumulated income might theoretically be drawn upon to meet future annuity payments being immaterial for this purpose.

Summary of Argument.

1. The payments actually made to charitable institutions by the petitioner constituted within the meaning of the statute "gross income . . . , which pursuant to the terms of the . . . deed creating the trust, . . . [was] during the taxable year paid . . . for . . . charitable . . . purposes."

(*a*) The deed of trust by its express terms authorized the trustees to make these payments. They were therefore made "pursuant to" the terms of the deed. If it was competent for the Commissioner to insist for the first time at the argument before the Circuit Court of Appeals that the payments in question were not made "pursuant to" the terms of the trust instrument, the construction put upon these words by the majority of the Circuit Court of Appeals is plainly wrong. As pointed out in the dissenting opinion, this construction is not only inconsistent with the policy of Congress in encouraging contributions to charity, but is repugnant both to common usage and to substantially all the authorities, both federal and otherwise.

(*b*) It was not incumbent upon the petitioner, as assumed by the majority of the Board of Tax Appeals, to prove affirmatively that the payments in question were actually made out of money received during 1931 and not from accumulated income on hand at the beginning of the year. In view of the presumable purpose of Congress, the provision that a trustee may deduct "any part of the gross income . . . , which . . . is during the taxable year paid" to charitable institutions manifestly means that payments which are as between trustee and beneficiary properly chargeable against the amounts constituting for tax purposes the gross income of the trust are to be allowed as deductions. Any other construction would render largely nugatory the provision for the deduction of contributions by trust estates to charity, since the practical exigencies

of administration often make it necessary to carry over income from one year to another and impossible to determine whether a particular payment is made from funds received during the current year.

2. If the payments in question are disregarded, the receipts of the trust for 1931 (above the amounts required to pay annuities and expenses) constituted income "to be used exclusively" for charitable purposes. The trust deed provides that the entire estate, both principal and income, be applied, except so far as necessary for the purposes of the annuities, to charity. The excess in the income for 1931 over the limited amount required for the annuity payments of that year thus became charged with a charitable trust, subject to the condition subsequent that in some future year the trustee might draw upon it to provide the annuity payments then accruing. As was held by the Circuit Court of Appeals for the Second Circuit in *Hartford-Connecticut Trust Co.* v. *Eaton,* 36 F. (2d) 710 (affirming 29 F. [2d] 840) the excess of the receipts over the aggregate of the annuity payments for the current year constitutes income "to be used exclusively for religious, charitable, scientific or educational purposes" within the meaning of §162 (a) of the Revenue Act of 1928, notwithstanding the possibility that through the operation of the condition subsequent such excess might later be diverted to a non-charitable use, especially in view of the fact that the annuities are so small with reference both to the principal and to the income of the estate that this possibility of future diversion is purely theoretical.

Argument.

I.

THE CONTRIBUTIONS MADE DURING 1931 WERE DEDUCTIBLE AS PAYMENTS MADE FOR CHARITABLE PURPOSES PURSUANT TO THE TERMS OF THE TRUST INSTRUMENT.

1. The Construction given by the Majority of the Circuit Court of Appeals to the Words "Pursuant to the Terms of the Will or Deed creating the Trust" is manifestly wrong.

The importance of this question is obvious. The court will take notice of the fact that there are great numbers of trust instruments in which it is left to the discretion of the trustees to apply the income either to charitable or to non-charitable purposes as they may from time to time determine. The effect of the decision is that, although an individual who elects to make contributions to charity is allowed a deduction equal to 15 per cent. of his net income,—or even to a greater exent in certain cases; see §120 of the Revenue Act of 1928,—the income of a trust created by such an instrument is taxable without deduction even if the whole amount is contributed to charity. This result is so anomalous that it cannot in the absence of most positive language be supposed to have been the intention of Congress.

As this court has often recognized,—*e.g.*, in *Lederer* v. *Stockton*, 260 U.S. 3,—the successive revenue acts have disclosed a policy of encouraging contributions to charity by permitting such contributions to be deducted and the provisions for deductions of this class have been progressively more liberal. The individual may, of course, "do what he will with his own"; in order to encourage him to apply a part of his income to charity, he is allowed a deduction on account of contributions within specified limits. It is well-nigh inconceivable that, when Congress came to

deal with contributions by trust estates, it should have intended to reverse this policy and to offer a trustee having power to apply income to charity no inducement whatever to do so. In any event, no such intent can be attributed to Congress when it can be read into the statute only by disregarding the normal meaning of the words and taking them in a strained and unnatural sense.

Lincoln v. *Ricketts*, 297 U.S. 373, 376.

Any such departure from the ordinary meaning of the words is peculiarly obnoxious in construing a provision intended to encourage gifts to charity.

Helvering v. *Bliss*, 293 U.S. 144, 150.

That the meaning given by the Circuit Court of Appeals to the words "pursuant to" is not that which the words normally carry is suggested by the fact that it appears never to have occurred to the Commissioner, when assessing the tax, or to the Board of Tax Appeals that they might be so construed. As already pointed out, the Commissioner's denial of the deduction was put on an entirely different ground (R. 11). While the arguments before the Board of Tax Appeals are not in the record, it is patent that no such contention was made before the Board; although the Board was sharply divided upon another aspect of the case, each of the three opinions proceeds without discussion upon the assumption that the payments in question were made "pursuant to" the terms of the deed. It is, indeed, only upon a very liberal construction of the rule applied in *General Utilities & Operating Co.* v. *Helvering*, 296 U.S. 200, that it can be said to have been competent for the Commissioner under his general assignment of error,—"the Board erred in holding that the taxpayer was entitled to a deduction from gross income for the year 1931 of an amount of $2,000.57 paid to charitable organizations"

(R. 74),—to argue that the payments were not made "pursuant to" the terms of the deed; even if the argument was open, the frame of the several assignments shows clearly that no such idea was in the mind of counsel when they were prepared. The decision of the Circuit Court of Appeals, therefore, is in effect that a construction so recondite that it did not occur to anybody prior to the argument before that court must be adopted in the face of the overwhelming probability that the intention of Congress was just the contrary.

"Pursuant" is not a word of art, but has a perfectly well established meaning in common speech. Thus in Webster's New International Dictionary (2d Ed.) p. 2018, "pursuant" is defined as follows:—

> "Acting on, done in consequence of or in prosecution (of anything); hence, agreeable; conformable; following; according;—with *to* or *of*."

The definition in the New Standard Dictionary, p. 2014, is similar:—

> "In accordance; agreeably; conformably; usually with *to*."

So, in Black's Law Dictionary (3d Ed.) p. 1469, "pursuant" is defined as "conformable to, agreeable to, or in accordance with."

To settle the present question it is hardly necessary to do more than to ask what the meaning of the statute would be if, instead of the words "pursuant to," it used one of the terms thus recognized by the dictionaries as synonymous. If, for example, the statute spoke of contributions made "agreeably" to the terms of the trust instrument, no one would imagine that a contribution authorized by the trust instrument was not made "agreeably" to its terms, even if not imperatively required. The same would

be true if the statute spoke of contributions made "in accordance with" or "conformably to" the terms of the instrument.

If carried out consistently, the meaning given by the majority of the Circuit Court of Appeals to the words "pursuant to" would lead to surprising results. For example, the Constitution of the United States (Article VI) provides that "this Constitution, and the laws of the United States which shall be made in pursuance hereof, . . . shall be the supreme law of the land." No one has ever suggested that the "laws of the United States" thus referred to are only those which it is the imperative duty of Congress to enact; it has always been assumed that "made in pursuance thereof" is equivalent to "made in the exercise of authority conferred thereby." If the decision of the Circuit Court of Appeals is right, however, this fundamental provision has only a very narrow operation; an act passed by Congress in the exercise of discretion is not "the supreme law of the land," but may be overridden by the States *ad libitum*.

The general concurrence of the courts in the views of the lexicographers appears from the decisions cited by Judge Morton in his dissenting opinion. In his brief in opposition to the petition for certiorari the respondent said that this opinion was based on the meaning "thought to be given to 'pursuant to' in two old statutes and indictments unrelated to the necessities of a workable scheme of taxation." As to this it may justly be asked what the "necessities of a workable scheme of taxation" have to do with the question; the respondent has not suggested any reason why the statute is not just as workable if the words "pursuant to" are taken in their normal sense as if they are given an unnatural meaning. With regard to the authorities, it may be said that, if they do not deal with the phrase as it appears in the particular connection now

under consideration, this is because nobody has heretofore had the temerity to argue that it has in that connection the significance which the respondent seeks to attach to it.

If cumulative authority as to the ordinary meaning of "pursuant to" is called for, however, it can readily be supplied. Illustrations may, for example, be taken from the large group of cases dealing with statutes limiting the liability of persons acting "in pursuance" thereof. Thus in *Kent* v. *Great Western Ry. Co.*, 3 C.B. 714, the defendants' charter purported to limit their liability "for any thing done, or omitted to be done, in pursuance of this act." Maule, J., said (at p. 725; italics supplied):—

> "I think the subject-matter of charge in this action [an alleged overcharge for the conveyance of merchandise] clearly was a thing done, or omitted to be done, in pursuance of the act. The act *enables* the company to carry goods, charging a sum consisting of such toll as they choose to take, plus a reasonable sum for the carriage. The plaintiff and the defendants are in reality trying . . . whether, under the act, the defendants were *entitled* to charge certain prices."

So, in *Waterhouse* v. *Keen*, 4 B. & C. 200, which was a similar action against the proprietor of a turnpike, Holroyd, J., said (at p. 213; italics supplied):—

> "The action . . . in substance . . . is brought to recover money alleged by the plaintiff to have been unlawfully taken by the defendant as toll, *under color of the authority of the act.* The demanding and taking the toll was an act done in pursuance of the act. This is a case therefore within the words of the act."

Again, in *Hughes* v. *Buckland*, 15 M. & W. 346, a landowner assumed to act under a statute authorizing him to

arrest trespassers. It turned out that the place of the alleged trespass was actually on the land of a third person, though believed by the defendant to be on his own land. Parke, B., said (at p. 355; italics supplied):—

> "The act is general in its terms, and gives protection to all persons for all acts done in pursuance of it. Those words do not mean acts done in strict pursuance of the act, because, in such a case a party would be acting legally, and therefore would not require protection. The words, therefore, must be qualified by the decisions; and then the meaning will be that a party to be entitled to protection must bona fide and reasonably believe himself to be *authorized by the act.*"

The phrase "in pursuance of," as used in the Workmen's Compensation Act, 1923 (13 & 14 Geo. 5, c. 42) §14, has been similarly interpreted. In *Ocean Coal Co.* v. *Davies*, [1927] A.C. 271, Lord Atkinson said (at p. 284; italics supplied):—

> "The main reliance of the respondent was . . . on the first four and a half lines of . . . §14. . . . Under this section . . . [the employer] may . . . terminate the weekly payment if, in the doing of that, he acts 'in pursuance of an agreement or arbitration.' If anything is clear I should think it is that the words 'pursuance of an agreement or arbitration' mean in this connection simply *the doing of what an agreement or an arbitration authorizes and entitles the employer to do.*"

So, in *Potter* v. *Realty Securities Co.*, 77 Fla. 768, the court said (at p. 772):—

> "Pursuant means conformable to, agreeable to, or in accordance with."

It cannot, however, be necessary to multiply authorities on a point so obvious. The question is rather as to what the respondent can show to overcome the strong presumption that the phrase was not used in the abnormal sense insisted upon.

Old Colony Railroad Co. v. *Commissioner*, 284 U.S. 552, 561.
Miller v. *Robertson*, 266 U.S. 243, 250.
DeGanay v. *Lederer*, 250 U.S. 376, 381.

In the brief filed in opposition to the petition for certiorari reference was made to §162 (c) of the Revenue Act of 1928 and it was said that "Congress when it meant discretion of the trustee expressly so stated in §162 (c) which follows almost immediately after the provision in question here." A reading of §162 (c), however, shows that it relates to an entirely different subject and that its general frame is such that the use of the phrase "pursuant to" would have been most awkward. Such a difference in phraseology is of no consequence, when the diversity manifestly results from differences in the structure and subject matter of the respective sections.

The Portland (C.C.A. 9) 273 Fed. 401, 403.

In *Lawless* v. *Sullivan*, 6 A.C. 373, the controversy arose under a statute imposing a tax on the "income" of banks and certain other corporations. The taxing authorities maintained that, in computing the taxable "income," losses must be disregarded, in view of the fact that in another section of the statute (relative to insurance companies) the basis of the tax was referred to as the "net profits." In reply to the argument that "the Legislature would have said net profits if they had so intended" Sir Montague E. Smith remarked (at p. 375): "The burden is on those who

seek to put the most onerous meaning on words used to show clearly that that meaning was intended"; he further said in delivering the opinion of the Judicial Committee (at p. 382):—

> "It was argued that the words 'net profits' appearing in these enactments raised a strong implication that the Legislature meant by 'income' something different from 'net profits.' This argument has undoubtedly some force, but is not of sufficient cogency to justify an interpretation being given to the word 'income,' as applied to a commercial business, other than that which it naturally bears. The employment of different language in the same Act may, in some cases, help to show that the Legislature had in view different objects, but a change in language cannot be relied on as furnishing a general rule of construction, and the weight to be given to such changes must depend on a view of the entire enactments in which they occur, and the degree of ambiguity existing in the language to be construed."

The respondent has cited *Boston Safe Deposit & Trust Co.* v. *Commissioner* (C.C.A. 1) 66 F. (2d) 179, and *Guaranty Trust Co.* v. *Commissioner*, 31 B.T.A. 19, in support of the proposition that "deductions under §162 (a) for amounts which pursuant to the terms of a trust deed are permanently set aside for charitable purposes cannot be had when such amounts in the discretion of the trustee under possible exigencies of the trust can be used for other than charitable purposes." As to this it is enough to say that in neither case had there been any attempt to impose a tax with respect to funds actually paid for charitable purposes or irrevocably appropriated to charitable uses. In neither was there any intimation that, if payment had

been made or an irrevocable appropriation effected, the sums so paid or appropriated would have been taxable; the whole controversy was as to income which had been retained by the trustees and which it was competent for them to apply in the future to non-charitable purposes. Indeed, in *Guaranty Trust Co.* v. *Commissioner*, the Board expressly said (31 B.T.A., at p. 22; italics as in the original), "Respondent has made no attempt to lay a tax upon those amounts *actually paid* for the uses of the home."

The respondent has further asserted that "it is settled in the case of estate taxes that specific gifts to charitable institutions are exempt, while charitable gifts left to the discretion of a fiduciary under the terms of the will are taxable," citing *Mississippi Valley Trust Co.* v. *Commissioner* (C.C.A. 8) 72 F. (2d) 197, and *Helvering* v. *Pardee*, 290 U.S. 365, 370. The short answer to this is that the statutory provisions with respect to the estate tax are entirely different both in form and in substance and do not contain either the words "pursuant to the terms of the will" or any similar phrase; these provisions have no tendency to show that Congress in the section now under consideration used this familiar phrase in any but its normal sense.

In this connection the respondent has argued that "the deduction should be denied for an additional reason, namely, that the deed of trust did not direct that payments be made *from income*" and that "it is settled that a trustee may not deduct payments to annuitants whose payments are not required to be made from income . . . and the same principle should be applicable here." This contention, it is submitted, necessarily falls as soon as it is determined that "pursuant to" is to be taken in its normal sense of "agreeably to" or "in accordance with." The statute provides that income paid "pursuant to the terms of the will or deed" shall be deducted. If this means that income paid to charity in the exercise of authority conferred

by the will shall be taxed, it is manifest that, if the trustee has discretion to pay to charity either from income or from principal and elects to pay from income, there is a payment from income "pursuant to the terms of the will or deed" as much as when the trustee, having discretion either to pay out income or to retain it, elects to pay it out.

Burnet v. *Whitehouse*, 283 U.S. 148, which may be cited by the respondent, is irrelevant for similar reasons. All that was decided in that case was that an annuity charged upon a trust estate generally constituted a gift as against the annuitant, so that income used to pay the annuity should be deemed for tax purposes the income of the trust and not that of the annuitant. The sections of the statute considered in that case contained no provision that payments from income to annuitants "pursuant to the terms of the will" should not be taxable as against the trustee and the opinion gives no remotest hint that, if there had been such a clause, it would not have been given effect.

Bowers v. *Slocum*, 20 F. (2d) 350, which is cited by the majority of the Circuit Court of Appeals, arose under §219 of the Revenue Act of 1918 (corresponding to §162 of the Revenue Act of 1928), but raised an issue entirely different from that now presented, *i.e.*, whether, if the trust instrument unequivocally directed that certain income be devoted to charity, the failure of the trustees to pay over such income or make appropriate entries in their books affected the right to claim a deduction; no question as to the exercise of a discretion given by the trust instrument was involved.

The majority of the Circuit Court of Appeals quote from the opinion of the District Court for the Western District of Kentucky in *Charles P. Moorman Home for Women* v. *United States*, 42 F. (2d) 257, language which may seem at first sight to support their conclusion. Upon examination, however, it will be found that in the Moorman case

no payments to charity had actually been made during the taxable year; the income, so far as not required for the support of the life tenant, had simply been allowed to accumulate. As the judge construed the will, the remainder interest to which the charitable use attached was contingent until the death of the life tenant, whose support constituted a first charge both on the income and on the principal. Thus the action of the trustee in assuming to earmark the unexpended income as appropriated to charity was merely officious. That the judge was not referring to a case like the present,—in which the trust instrument expressly gives the trustee authority to make outright gifts to charity in its discretion,—is shown by the following language (p. 260):—

> "As I view the law, if the instrument creating the trust clearly provides that the income of the trust as it accrues each taxable year shall be paid or permanently set aside to the charitable corporation, it will be exempt from taxation for each of the taxable years, notwithstanding the trustee may have failed or neglected either to pay it or permanently set it aside. On the other hand, if it appears from the instrument creating the trust that it was not the intention of the creator that any part of the income of the trust should be paid to or permanently set aside for the charitable corporation during the taxable year, the action of the trustee in paying or setting aside same during that year would not operate to exempt it from taxation."

It is thus patent that the language which precedes this passage and which is quoted by the majority of the Circuit Court of Appeals (R. 79) simply means that a payment may not be deemed to have been made "pursuant" to the trust instrument if not contemplated by the instrument,

but made by the trustee *suo motu;* in 4 Paul and Mertens on Federal Income Taxation, §34.60, it is so interpreted. It is hardly necessary, moreover, to suggest that, even if not thus susceptible of ready explanation, the opinion of a single district judge would be a slender foundation upon which to rest a decision which is right in the teeth of all the other authorities; the opinion has been examined in order to show that the position taken by the majority of the Circuit Court of Appeals has not even this slight support.

The majority opinion, in short, gives the statute an interpretation contrary to all the authorities and to the manifest intention of Congress. The decision means that the many trust estates established by instruments giving a discretionary power to apply income to charity must pay a tax on their entire income, even if every cent of it is actually and irrevocably paid over to charitable institutions during the year in which it is received. Such a conclusion, it is submitted, cannot stand.

2. *The Majority of the Board of Tax Appeals erred in holding that the Taxpayer must affirmatively prove that the Payments in Question were actually made out of Money received during 1931 and not from accumulated Income on Hand at the Beginning of the Year.*

As already pointed out, the proceedings before the Board of Tax Appeals were based on the assumption that the payments in question were made "pursuant" to the terms of the trust instrument. The Board had, moreover, no difficulty in finding that these payments were made out of income. The only reason why the deduction claimed by the taxpayer was not allowed in full was because it did not appear (except as to $2,000.57) that the actual money paid to charitable institutions during 1931 was taken from

income received during that year and not from income accumulated at the beginning of the year. The majority of the Board stated as follows their theory as to the decisive issue (R. 58):—

> "The question is, How much, if any, of the gross income of 1931 was paid to the charities in 1931 and thus used for charitable purposes pursuant to the terms of the deed creating the trust within the meaning of section 162 (a)? The deduction is based upon the use of the income subject to tax and not upon the use of accumulated income of prior years."

If the majority of the Circuit Court of Appeals erred in holding that the payments in question were not made "pursuant to" the terms of the trust instrument, it will be necessary to decide whether the theory thus propounded by the majority of the Board is sound. The course of the case in the Circuit Court of Appeals and in this court suggests, however, that the question is not one of much difficulty. In the argument before the Circuit Court of Appeals the respondent made little attempt to sustain the view expressed by the majority of the Board. In the brief in opposition to the petition for certiorari the respondent did not venture to suggest that the construction given the statute by the majority of the Board could be supported. Analysis makes clear the respondent's reason for thus abandoning the main point relied upon by the majority of the Board and for seeking to reach the desired result by a wholly different route.

The proposition laid down by the majority of the Board is equivalent to saying that whether payments to charity are allowable as deductions depends, so to speak, upon the particular pocket out of which the trustee elects to take the money actually paid over. If carried to its logical conclusion this would mean that a trustee could obtain the

benefit of the deduction only if he kept the net income of each year in cash or its equivalent in a separate box or bank account and made all contributions out of that fund. The effect is to render the provision for deduction worthless to a trust estate conducted in the ordinary way; it is patent that the practical exigencies of such an estate must often make it necessary to carry over income from one year to another and impossible to determine whether a particular payment is made from the income of the current year.

The objections to such an ultra-literal and unreasonable interpretation of the statute are pointed out in the dissenting opinion of Board Member Smith (R. 59-60), which states the matter so clearly that little can be added. As observed in this opinion, the result is altogether out of harmony with the view expressed by this court in *Lederer* v. *Stockton*, 260 U.S. 3, *i.e.*, that the favor which Congress intended to extend to charitable gifts is not to be defeated by the mere form of the transaction. The views of the majority have likewise been questioned by Messrs. Paul and Mertens (4 Law of Federal Income Taxation, Supplement of 1936, p. 32).

There is, indeed, no difficulty in taking "any part of the gross income . . . , which . . . is during the taxable year paid or permanently set aside," etc., as meaning that payments which are as between trustee and beneficiary properly chargeable against the amounts constituting for tax purposes the gross income of the trust are to be allowed as deductions. It must be assumed that Congress in enacting §162 (a) took notice of the manner in which trust estates are commonly administered and did not intend to make the exemption depend upon the trustee's making a segregation which would never be made in ordinary accounting practice. It is likewise to be assumed that Congress had no purpose to establish a purely arbitrary distinction and to cause the right to claim the deduction to hinge on a mere accidental

circumstance having no relation to a policy which has run through the income tax laws from the beginning.

It is further to be noted that the deduction allowed to individuals on account of contributions to charity is in no way conditioned upon the source from which the contributions are taken. It is recited in §162 (a) that "there shall be allowed as a deduction (*in lieu of the deduction for charitable, etc., contributions authorized by section 23[n]*) any part of the gross income, *without limitation,*" etc. (Italics supplied.) It would surely be a strange thing to allow to estates and trusts "in lieu" of the limited deduction allowed individuals a deduction which purported to be "without limitation," but which was so restricted in another particular as often to be worthless.

It may be argued by the Commissioner that, even if the trustee is entitled to deduct contributions from income received in the form of interest, dividends, etc., it is not entitled to a deduction from gains on the sale of securities because the trustee, following its usual practice, carried such gains into its capital account. It would seem that there must be something wrong with an argument to the effect that the same items constitute income as against the taxpayer but not as against the government. It is unnecessary, however, to deal with this point in its broader aspects. As applied to the present case the argument fails because the trust deed gave the trustee power to apply both principal and income to charity. The test for purposes of deduction is whether the contributions were such as might properly be made out of the sums constituting gross income for tax purposes. It is plain that the contributions now in question might be so made regardless of whether the sums regarded as income for tax purposes were deemed principal or income as between the trustee and the beneficiaries. The Commissioner earnestly insists that the manner in which the trustee enters particular items in its books can-

not give rise to a deduction not otherwise permissible and, if this be the general rule, the trustee submits that it must work both ways.

The result is that the case should be disposed of on the short ground indicated by the dissenting members of the Board of Tax Appeals, *i.e.*, that the entire income of the trust for 1931 (less expenses and annuity payments) must be taken to have been paid for charitable purposes during that year.

II.

IF THE PAYMENTS IN QUESTION ARE DISREGARDED, THE RECEIPTS OF THE TRUST FOR 1931 (ABOVE THE AMOUNTS REQUIRED TO PAY ANNUITIES AND EXPENSES) CONSTITUTED INCOME "TO BE USED EXCLUSIVELY" FOR CHARITABLE PURPOSES.

There can be no pretence that the income of 1931, after deducting the sums necessary to meet the annuities and expenses of that year, was applied through any act of the trustee to non-charitable purposes. If it be assumed for the sake of argument that, either for the reason given by the majority of the Board of Tax Appeals or for that assigned by the majority of the Circuit Court of Appeals, the payments are not allowable as deductions, the case must stand as if those payments had not been made and as if the sums in question had been retained by the trustee. On this assumption the question is whether these sums constituted income "to be used exclusively" for charitable purposes within the meaning of the statute.

It is apparent that the provision as to amounts "to be used exclusively" for charitable purposes is complementary to the provision that amounts "paid or permanently set aside" for such purposes shall be deductible. The latter refers to sums applied to charity through some act on the part

of the trustee; the former covers moneys to which a charitable use attaches automatically by virtue of the trust instrument. It will doubtless be conceded by the respondent that, if under the terms of the trust instrument it was necessary that the sums in question be eventually applied to charity, the fact that they were not paid over during the taxable year would not be material. As the case actually stands, the entire trust property,—both principal and income,—is charged with a charitable use, subject to the condition subsequent that either principal or accumulated income may be used in the discretion of the trustee to meet annuity payments. In this aspect, therefore, the case raises a question as to which the Circuit Court of Appeals for the First Circuit and the Circuit Court of Appeals for the Second Circuit are in conflict. In the Second Circuit it has been held that, if the terms of the trust instrument are such that the income, as received, is charged with a charitable use, the existence of a condition subsequent whereby the sums in question may possibly be diverted to a non-charitable purpose does not prevent such sums from constituting income "to be used exclusively" for charitable purposes within the meaning of the statute.

Hartford-Connecticut Trust Co. v. *Eaton*, 36 F. (2d) 710, affirming 29 F. (2d) 840.

This decision has been followed by the District Court for the District of Connecticut in *Hartford-Connecticut Trust Co.* v. *Eaton*, 41 F. (2d) 69. In the case at bar, however, the majority of the Circuit Court of Appeals for the First Circuit dealt with the point as follows (R. 82):—

> "Nor can it be held that any part of the income for the year 1931 was, by direction of the trustor in the deed of trust, set aside permanently for charities, or to be

so used, since it might at any time be used for payments to charities in the discretion of the trustee whenever the income for any one year equaled twice the amount due the annuitants for that year. Under the deed of trust it was not until the last survivor of those entitled to receive income thereunder had died that the trustee can be said to have been directed to distribute to charities any part of the trust fund or income thereof remaining in the hands of the trustee."

This was in line with the opinion in *Boston Safe Deposit & Trust Co.* v. *Commissioner*, 66 F. (2d) 179, in which the same court had said (at p. 184):—

"We think the words 'or to be used' have no such significance as was given them in *Hartford-Connecticut Trust Co.* v. *Eaton* [36 F. (2d) 710]."

The soundness of the view taken in the Second Circuit appears from the opinion of this court in *Binney* v. *Long*, 299 U.S. 280 (delivered four days after the decision of the Circuit Court of Appeals in the case at bar). In the previous case of *Coolidge* v. *Long*, 282 U.S. 582, it was held that if, prior to the enactment of an inheritance tax law, a remainder became vested, the taking effect of the remainder in possession or enjoyment did not constitute a taxable occasion in spite of the fact that until the termination of the life estate the remainder was subject to be defeated by a condition subsequent. In *Binney* v. *Long*, on the other hand, the remainder interest was contingent until the termination of the life estate and it was held that the vesting of the remainder was therefore taxable, even though the trust was established much before the enactment of the tax law. If in the case at bar it lay in the option of the trustee to determine whether at the termination of the trust the estate should be applied to charitable

or to non-charitable uses, the case would be like *Binney* v. *Long* and it might be impossible to say that receipts of the trust, in the absence of action by the trustee, were "to be used exclusively" for charity. As it is, however, the case is exactly like *Coolidge* v. *Long;* since the charitable use attaches automatically to all receipts of the trust, such receipts are "to be used exclusively for charity," even though it is possible that they may through the operation of the condition subsequent be diverted to other purposes.

It is unnecessary, however, to rely entirely upon this principle, because the result would be the same even if the statute purported to deny the right to claim deduction with respect to sums to which there attached a charitable trust subject to a condition subsequent. It is well settled that under a statute of that kind the decisive question is not whether there exists in theory a condition subsequent, but whether in view of the particular facts there is any substantial prospect that the condition subsequent will ever take effect. If there is an overwhelming probability that the condition subsequent will never come into operation, it must be disregarded.

In *Ithaca Trust Co.* v. *United States,* 279 U.S. 151, this principle was applied to the provisions of the Revenue Act of 1918, §403 (a) (3), respecting estate taxes. Mr. Justice Holmes said (at p. 154):—

> "On June 15, 1921, Edwin C. Stewart died, appointing his wife and the Ithaca Trust Company executors, and the Ithaca Trust Company trustee of the trusts created by his will. He gave the residue of his estate to his wife for life with authority to use from the principal any sum 'that may be necessary to suitably maintain her in as much comfort as she now enjoys.' After the death of the wife there were bequests in

trust for admitted charities. The case presents two questions the first of which is whether the provision for the maintenance of the wife made the gifts to charity so uncertain that the deduction of the amount of those gifts from the gross estate under §403 (a) (3), *supra,* in order to ascertain the estate tax, cannot be allowed. *Humes* v. *United States,* 276 U.S. 487, 494. This we are of opinion must be answered in the negative. The principal that could be used was only so much as might be necessary to continue the comfort then enjoyed. The standard was fixed in fact and capable of being stated in definite terms of money. It was not left to the widow's discretion. The income of the estate at the death of the testator, and even after debts and specific legacies had been paid, was more than sufficient to maintain the widow as required. There was no uncertainty appreciably greater than the general uncertainty that attends human affairs."

The principle thus followed is in line with the general law of administration. If a fund is transferred by an executor to a trustee on a given day, the beneficiary may not be heard to say that, because pending litigation might in a remote possibility so develop as to require a return of the property, the transfer should be deemed provisional only. In *First National Bank of Boston* v. *Truesdale Hospital,* 288 Mass. 35, the court said (at p. 41):—

"Truesdale Hospital contends that the establishment of the trust for it on May 22, 1931, was incomplete, tentative and provisional only. . . . True, the number of shares for division had not then been adjudicated by our earlier decision. [*First National Bank of Boston* v. *Union Hospital,* 281 Mass. 64.] But the division was based on principles subsequently decided to be correct. No party, in the earlier case before us, contended that

there were fewer than twenty-five thousand shares to be divided. . . . Any possibility of a decision that there were no shares to be divided was deemed very remote. The fact that the set up of a trust fund may conceivably be affected by an unexpected turn of events does not make it ineffective."

This principle has been successfuly invoked by the government in cases in which the question has been whether a legacy has vested in possession for purposes of taxation. For example, in *Henry* v. *United States*, 251 U.S. 393, it was contended by the taxpayer that, if a legacy was paid before the time for proving debts against the estate had expired, it could not be regarded as vested in possession until the end of that period. This contention was overruled, Mr. Justice Holmes saying (at p. 394) :—

"There is no doubt that if the claimant had retained the funds in his hands, as he had a legal right to do, the interest of the legatees would not have been vested in possession within the meaning of the statute, whatever the probabilities and however solvent the estate. *United States* v. *Jones*, 236 U.S. 106. *McCoach* v. *Pratt*, 236 U.S. 562. He contends that the same is true if he saw fit to pay over legacies before the time came when they could be demanded as of right. We will assume that, if the estate had proved insufficient, the executor not only would have been responsible but could have recovered such portion of his payments as was needed to pay debts. Still the consequence asserted does not follow. . . . The remote possibility that the funds in the hands of the legatees might have to be returned no more prevented their being vested in possession and taxable than the possibility that a life estate might end at any moment prevented one that began before July 1, 1902, being taxed at its full value

as fixed by the mortuary tables. *United States* v. *Fidelity Trust Co.*, 222 U.S. 158, 160."

So, in *Simpson* v. *United States*, 252 U.S. 547, it was held that the vesting of the legacies was not affected by the pendency of a suit for a large sum against the estate in the absence of evidence that the suit constituted a real threat. Mr. Justice Clarke said (at p. 552):—

"Obviously, such a showing of such a suit cannot be considered to have been a genuine obstacle to settlement of the estate, and the other claims against it were negligible in comparison with the available assets."

Again, in *Cochran* v. *United States*, 254 U.S. 387, the question was whether a tax law which became inoperative on July 1, 1902, applied to legacies paid before that date, if there existed on that day a theoretical possibility that the legatees might be called upon to refund in the event that the retained assets proved insufficient to pay all claims. Mr. Justice McKenna said (at p. 392):—

"We have seen the amount of taxes imposed by the statute was definite and the appellants had no trouble in estimating and returning the value of the legacies upon which it was imposed. The basis of the claim of uncertainty is that the estate was and is not settled and that there is a possibility that the legatees may be called upon to pay debts. The contention is as strained and baseless as that rejected in *Simpson* v. *United States, supra.*

* * * * * * * *

"While it is averred that the clear value of the interests of the legatees was at all times prior to July 1, 1902, uncertain and indefinite, and still is so, there stand in opposition the facts of the case and the refu-

> tation that an estate of the net personal value of nearly eight million dollars was or is in danger of embarrassment by the payment of legacies of less than one million dollars. And we have seen that the executors who had knowledge of the condition of the estate, and all that it might be made subject to, did not hesitate to make a return of the legacies to the Collector of Internal Revenue and pay the taxes thereon. The petition in this case was filed in the Court of Claims June 23, 1916, fourteen years after the commencement of the administration of the estate and nearly as long after the time of presentation of claims against it, and the record shows that the total of the claims and expenses of administration, including funeral expenses, amounts to the sum of $235,700. In the face of this exhibition we are asked to speculate upon possibility of the existence of liabilities that fourteen years have not developed."

If the government has succeeded in establishing the rule that the test of substantiality is to be applied when it works against the taxpayer, it cannot object to the use of the same test when it works in his favor.

Applying to the case at bar the test thus established, the result is plain. The capital value of the annuities was little more than $200,000, whereas the corpus of the trust estate taken at the depressed market values obtaining on December 31, 1931, was almost $1,500,000 (R. 54). The total of the annuities for that year was $22,900, while the net income of the trust (not including gains on sales) was $114,417. It was certain that the amount payable to the annuitants would steadily diminish; their average age was over sixty-five, three of them being, indeed, over seventy and one over eighty (R. 54).

Under the law of Massachusetts, where the settlor resided and where the trust is administered, annuities, even if charged both upon income and upon principal, must be paid so far as possible out of income unless the trust instrument provides otherwise.

> *Cummings* v. *Cummings*, 146 Mass. 501.
> *Tirrell* v. *Commissioner of Corporations & Taxation*, 287 Mass. 464.

"Income" for this purpose means income as determined in accordance with the ordinary principles of trust accounting and not income as defined by the income tax laws; hence any gains on sales in a case like the present may be diverted to non-charitable purposes only after all accumulated income, as well as all current income, has been exhausted. In *Williams* v. *Milton*, 215 Mass. 1, the court said (at p. 11):—

> "In case of a trust . . . any gain made by a change of investment is an accretion belonging to the corpus of the trust fund and belongs to those who own the corpus of the fund. Such gains become part of the corpus as much as the original money contribution to the trust fund."

So, in *Tax Commissioner* v. *Putnam*, 227 Mass. 522, it was held that gains on sales constituted "income" for the purposes of the Massachusetts income tax, but it was recognized (at p. 529) that as between trustee and beneficiary "profits and gains arising from the increase in value of investments and realized by sale are treated as a part of the principal and not as income."

In so far as the nature and incidents of a property right are material in determining questions arising under the

federal tax laws, the federal courts accept the state decisions as controlling.

Blair v. *Commissioner*, 299 U.S. — (Feb. 1, 1937).
Tyler v. *United States*, 281 U.S. 497.
Guffey v. *Smith*, 237 U.S. 101.

Unless there should come to pass some cataclysm which destroyed all property values and completely stalled the economic machinery,—a possibility which, of course, overshadows every financial arrangement, but which practical men treat much as they treat the corresponding possibility of being struck by a falling aeroplane,—it is hardly conceivable that it should ever become necessary to draw upon the excess income of 1931 or upon the principal in order to offset such a decline in the current income as should render it insufficient to cover the annuities. While the distinction is believed to be unimportant for the present purpose, it is to be noted that, in view of the rule established by the Massachusetts authorities cited above, the chance that the gains on sales which constitute a part of the "gross income" for tax purposes will ever become payable to the annuitants is even more remote than the chance that through a falling-off in current income it may become necessary to draw upon accumulations.

The purely theoretical nature of the possibility in question is further shown by the course of events since the close of 1931. The income of the trust (exclusive of profits) has greatly exceeded the amounts needed for the payment of the annuities and large distributions have been made to charity accordingly (R. 21, 42-44, 48-50). To adopt the language quoted above from the opinion of Mr. Justice McKenna in *Cochran* v. *United States*, 254 U.S. 387, the government cannot ask the court to speculate upon the possibility of untoward events which the years subsequent to 1931 have not developed.

Another important factor in the present case is that the settlor's primary purpose was to devote the trust property to charity in fulfillment of his brother's wishes and in perpetuation of the latter's memory. This appears from the opening recitals of the deed, from the request that any fund given by the trustees to a charitable institution be designated as "the Henry Clay Jackson Fund" (R. 24, 29, 34), from the careful directions with respect to selection of the charities to be aided (R. 30) and from the wishes of the settlor and of his brother as expressed to Arthur T. Johnson, Esq., who drafted the deed (R. 23, 45-50).

Finally, there is the vital consideration that the trustee, at all times since the establishment of the trust, has had it in its power to pay over to charity the entire trust fund with the exception of such amount,—say, $200,000,—as might be reasonably necessary to support the annuities (R. 20). In Massachusetts it is well settled that, if there is no provision in a trust instrument with respect to the source from which specified annuities are to be paid and the instrument provides for the distribution of the rest of the fund, the trustees should purchase annuities or reserve enough of the fund to yield an income sufficient to meet the periodical payments and should then distribute so much of the fund as is not needed for these purposes.

Williams v. *Thacher*, 186 Mass. 293, 300.
Bartlett, petitioner, 163 Mass. 509, 513.
Dexter v. *Episcopal City Mission*, 134 Mass. 394, 397.
Sears v. *Hardy*, 120 Mass. 524, 542.
Treadwell v. *Cordis*, 5 Gray, 341, 351.

It follows that, but for the clause giving the trustee in the present case discretion as to when and how distributions to charity shall be made, it might have been compelled upon application by the Attorney General at any time after the

first year forthwith to apply to charity the entire trust fund other than such part as might be adequate to support the annuities. Whatever may be the law in other States, it is settled in Massachusetts that a gift to charity in the most general terms will be enforced.

Kirwin v. *Attorney General,* 275 Mass. 34.
Weber v. *Bryant,* 161 Mass. 400.
Saltonstall v. *Sanders,* 11 Allen, 446.

The gift to charity must be deemed vested from the beginning even if the trustee is given a discretion as to its application, so that a considerable time may elapse between the establishment of the trust and its application to any particular charity.

Codman v. *Brigham,* 187 Mass. 309.
Minot v. *Baker,* 147 Mass. 348.
Brigham v. *Peter Bent Brigham Hospital* (C.C.A. 1) 134 Fed. 513.

It is, moreover, the law of Massachusetts that, if an annuity is charged upon a fund much larger than is necessary to support it and if the trustee is given discretion as to when the excess shall be distributed, this discretion is not absolute, and that, if the trustee holds back a sum manifestly excessive for that purpose, he will be compelled to make distribution. In a situation like the present, therefore, the Attorney General may compel a distribution to charity of part of the trust fund if the trustee assumes unreasonably to withhold the distribution of excess income or principal. An attempt to withhold all excess income and all principal until the death of the last annuitant could not be justified.

Williams v. *Bradley,* 3 Allen, 270, 285.
Wilson v. *Wilson,* 145 Mass. 490, 492.

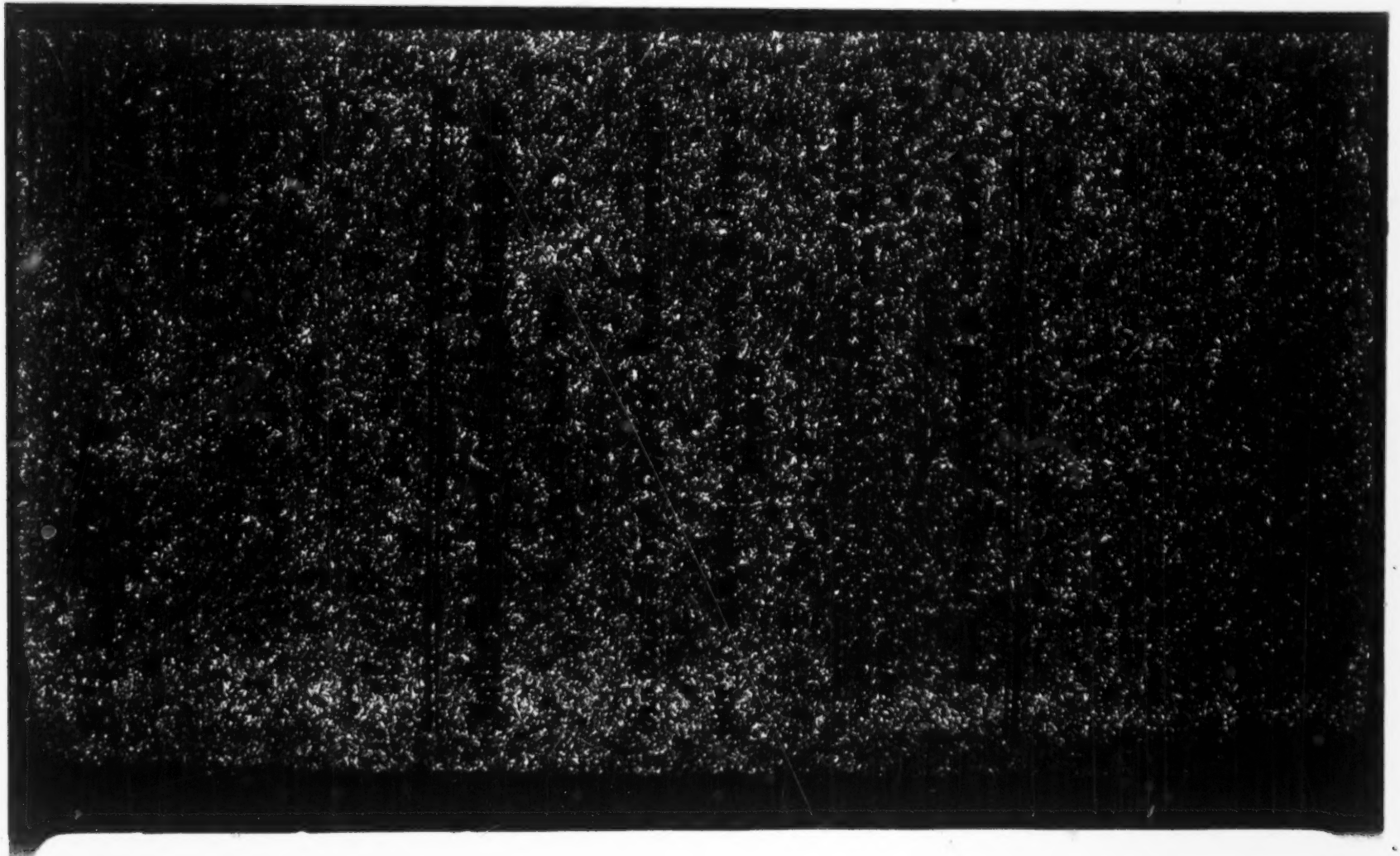
Corkery v. *Dorsey*, 223 Mass. 97, 101.
Boyden v. *Stevens*, 285 Mass. 176, 179.

All these considerations go to increase the unlikelihood that the sums now in question will ever be diverted from the charitable use through the operation of the condition subsequent and to show that the existence of the condition subsequent does not, in the actual circumstances, constitute a ground for saying that these sums are not "to be used exclusively" for charity.

It follows that all of the sums comprised in the gross income of the estate for 1934 (less the amount paid to annuitants, etc.), constituted income "to be used exclusively" for charitable purposes and so would not have been taxable, even if there had been no actual payments or appropriations during that year.

It is accordingly submitted that the decree of the Circuit Court of Appeals should be reversed and the case remanded to the Board of Tax Appeals with instructions to reinstate the petitioner's return subject to the minor adjustments (R. 19, 23, 55, 62) to which it now agrees.

FRANCIS V. BARSTOW,
HAROLD S. DAVIS.



INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute and regulations involved	2
Statement	2
Argument	7
Conclusion	13
Appendix	14

CITATIONS

Cases:	
Boston Safe Deposit & Trust Co. v. *Commissioner*, 66 F. (2d) 179	10, 12
Charles P. Moorman Home for Women et al. v. *United States*, 42 F. (2d) 257	8
Guaranty Trust Company of New York v. *Commissioner*, 31 B. T. A. 19	10, 12
Hartford-Connecticut Trust Co. v. *Eaton*, 36 F. (2d) 710	11, 12
Helvering v. *Pardee*, Case No. 77, 290 U. S. 365	10
Mississippi Valley Trust Co. v. *Commissioner*, 72 F. (2d) 197	10
Statute:	
Revenue Act of 1928, c. 852, 45 Stat. 791, 801, 838:	
Sec. 23	14
Sec. 161	15
Sec. 162	16
Miscellaneous:	
Regulations 74, Art. 862	17

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In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 703

OLD COLONY TRUST COMPANY, TRUSTEE, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 56–66) is reported at 33 B. T. A. 311. The opinion of the Circuit Court of Appeals (R. 87–94) has not yet been officially reported.

JURISDICTION

The judgment of the Circuit Court of Appeals for the First Circuit was entered December 10, 1936. (R. 95.) The petition for writ of certiorari was filed February 4, 1937. The jurisdiction

of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The only question presented is whether the Circuit Court of Appeals erred in holding that the petitioner is not entitled to deduct from its gross income, in computing its taxable net income for the year 1931, certain amounts paid during the year to exempt religious, charitable or educational corporations.

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved will be found in the Appendix, *infra*, pp. 14–18.

STATEMENT

The facts were stipulated before the Board of Tax Appeals (R. 22–56).

Henry Clay Jackson, of Boston, Massachusetts, died intestate, leaving Paul Wilde Jackson, a brother, as his sole heir. (R. 28.) Paul Wilde Jackson, apparently to carry out certain wishes of his brother, executed a deed of trust under date of July 19, 1922 (R. 28–35), whereby he conveyed to the petitioner, as trustee, all of his right, title and interest in and to the property of Henry Clay Jackson remaining after payment of debts and other charges against the estate (R. 23).

The deed of trust, after providing for present distribution of a part of the property transferred and for the payment of stated annuities to a number of individuals, some of whom were still living during the taxable year involved, contained the further provision (R. 33–34):

> 13. I authorize my said trustees to pay to charities as hereinafter described such sums as in their judgment may be paid without jeopardizing the annuities herein provided for, whenever for a period of one year the trust fund held by them as then invested shall have yielded a net income equal to twice the amount of the annuities which they are then required to pay, and upon the death of the survivor of those persons, who under the terms of this instrument are to receive annual incomes under the trust hereby created, I direct my said trustees to distribute the rest and residue remaining in their hands among corporations and trustees organized, operating and holding exclusively for religious, charitable, scientific, literary or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, the sum paid over by said trustees to such corporations or boards of trustees to be held by such corporations and boards of trustees in trust, and the income thereof to be expended for the general purposes for which such corporations and boards of trustees are organized, and I request that said funds be desig-

named by each corporation or board of trustees as the Henry Clay Jackson Fund.

The first property received by the petitioner under the deed of trust was received on May 29, 1923. (R. 24.) The total value of property received under the trust deed is not shown, but it was apparently quite substantial. Upon receipt of the first trust principal by the petitioner, separate accounts were opened for principal and for income (exclusive of gains from sales of corpus, which were carried in the principal account). The principal account has always been maintained separate and apart from the income account, and no annuity payments or payments to charities have been charged to the principal account. (R. 24.) The amount of trust income which the petitioner in its judgment considered to be available each year for payment to charities as not "jeopardizing the annuities", the amount appropriated to charities each year, and the years and amounts of payments to charities are stipulated. (R. 24–25.)

The income account of the trust disclosed an unexpended balance at January 1, 1931, the beginning of the taxable year involved, of $187,999.43. (R. 24, 38, 60.) During the year 1931, the trust received net income of $164,339.39. (R. 23, 38–39, 60.) Of this amount, $61,481.32 represented gains from sales of corpus which were added to the capital account and the balance of $102,858.07 represented income from other sources which was credited to the income account. (R. 13, 15, 23, 25, 38–39, 60.)

During the year 1931, the trust expended $212,862.80 from the income account, of which $22,350 represented annuity payments and $190,000 represented the payments to charities involved in this proceeding. This left a balance of $89,553.99 in the income account at the close of the taxable year. (R. 25, 39, 60.) There is no dispute that the $190,000 was paid to institutions which are charitable within the meaning of Section 162 (a) of the Revenue Act of 1928. (R. 26.)

The petitioner filed a fiduciary return for 1931 on Form 1041 showing the trust income apportioned to itself and to the annuitants. (R. 23, 35–36, 61.) It also filed an individual income tax return on Form 1040 for itself, as trustee, in which it reported as gross income the income apportioned to it on the fiduciary return and took a deduction of a like amount "Set aside for Charitable and Educational Purposes." Capital net gains from sales of trust corpus held more than two years were also reported in the individual return filed by the petitioner and shown as "Set aside for Charitable and Educational Purposes." (R. 23, 37–38, 61.)

In auditing the returns filed, the Commissioner of Internal Revenue determined net income to be $164,339.39, consisting of $61,481.32 representing gains from sales of trust corpus and $114,417.36 income from other sources. (R. 11–13, 23, 38–39, 60.) He allocated the entire net income and capital net gain to the petitioner, as trustee, allowing no deduction for payments to annuitants or pay-

ments to charities, and determined the deficiency in controversy. (R. 12–15.)

The Board of Tax Appeals sustained the Commissioner's action in disallowing the deduction for amounts paid to annuitants (R. 61–62), and that part of its decision was not appealed.

On the question of deductions for $190,000 paid to charities during the year, the Board of Tax Appeals held that the petitioner was entitled under Section 162 (a) of the Revenue Act of 1928 to deduct that part of the gross income for 1931 which was paid to charities, but found on the facts that not more than $2,000.57 of the gross income for 1931 had been used in making such payments. (R. 62–65.) Hence the Board allowed a deduction of $2,000.57. Both parties appealed to the Circuit Court of Appeals for the First Circuit.

In an opinion by Wilson, J., the Circuit Court of Appeals reversed the decision of the Board, and held that no part of the amount in controversy was deductible. The court put its decision upon the ground that deductions under Section 162 (a) must be distributions for charitable purposes which are directed to be made by the trustor, and not merely left to the discretion of the trustee. (R. 89–91.) Morton, J., who was of the opinion that the phrase "pursuant to the terms of the will or deed" in Section 162 (a) should be read as if it said "authorized by" the terms of the will or deed, dissented with no citation of direct authority. (R. 93.)

ARGUMENT

The only question involved in this proceeding is the narrow question whether the petitioner is entitled to deduct from gross income for 1931 the sum of $190,000, or any part thereof, as "any part of the gross income, without limitation, which pursuant to the terms of the will or deed creating the trust, is during the taxable year paid or permanently set aside for the purposes and in the manner specified in section 23 (n), or is to be used exclusively for religious, charitable, scientific, literary, or educational purposes" within the meaning of Section 162 (a) of the Revenue Act of 1928.

The trust instrument here permits the trustee whenever the net trust income for a year is equal to twice the amount required for annuities, to pay to charities "such sums as in their judgment may be paid without jeopardizing the annuities." (R. 33.) The Commissioner does not deny that such payments as were made to charities by the trustee were *authorized* by the terms of the trust, nor on the other hand does the petitioner contend that such payments were *directed* to be made by the trustor. The position of the Commissioner in disallowing the deduction, and before the Board of Tax Appeals and Circuit Court of Appeals, was that it is not every authorized payment to charity which is deductible, but only those payments which within the language of Section 162 (a) are made or permanently set aside from "any part of the gross

income" and "pursuant to the terms of the deed." The petitioner to sustain the claim of deduction has necessarily contended that Section 162 (a) should be construed to permit the deduction of amounts paid under the discretionary authority granted it by the terms of the trust. It is the position of the Commissioner that only those payments directed to be made by the trustor are deductible.

The Circuit Court of Appeals in ruling against the petitioner followed the decision in *Charles P. Moorman Home for Women et al.* v. *United States*, 42 F. (2d) 257 (W. D. Ky.), and quoted with approval the following statement of the law from that case (pp. 260, 261):

> The quoted language of section 219 of the act of 1918 makes it clear that the trust income, to be exempt from taxation as a charitable contribution, must be paid to or permanently set aside during the taxable year for a corporation organized and operated exclusively for charitable purposes, and that such payment or permanent setting aside must be pursuant to the terms of the instrument creating the trust. In other words, the instrument creating the trust must make it clear that it was the intention of the creator of the trust that such income should be paid during the taxable year to the charitable corporation or permanently set aside to it during such taxable year. The statute makes it very clear that it was not the intention of Congress to make the taxability of the income for any taxable year depend

upon the discretion of the trustee in paying or permanently setting aside the income of the trust to the charitable purpose during the taxable year, but to depend solely upon the provisions of the instrument creating the trust.

* * * * *

Section 219 (b) of the Revenue Act of 1924 grants the exemption, not only in cases where the income has been paid to or permanently set aside for the charitable purpose during the taxable year, but also in those cases where the income received during the taxable year is to be used exclusively for the charitable purpose. As in the acts of 1918 and 1921, however, the determining factor is the instrument creating the trust, and not the discretion of the trustee. Therefore, under the 1924 act, unless it appears from the instrument creating the trust that the income from which exemption is sought is set aside in the instrument creating the trust exclusively for a charitable purpose, or under the terms of that instrument is to be paid during the taxable year or permanently set aside during that year for the charitable purpose, it is not exempt. (R. 89, 90.)

The construction of Section 162 (a) followed by the Circuit Court of Appeals gives full effect to the plain language of the statute. Congress when it meant discretion of the trustee expressly so stated in Section 162 (c) which follows almost immediately after the provision in question here. (Appendix, p. 17.)

Deductions under Section 162 (a) for amounts which pursuant to the terms of a trust deed are permanently set aside for charitable purposes cannot be had when such amounts in the discretion of the trustee under possible exigencies of the trust can be used for other than charitable purposes. *Boston Safe Deposit & Trust Co.* v. *Commissioner,* 66 F. (2d) 179 (C. C. A. 1st); *Guaranty Trust Company of New York* v. *Commissioner,* 31 B. T. A. 19. So too, as pointed out by the court below, it is settled in the case of estate taxes that specific gifts to charitable institutions are exempt, while charitable gifts left to the discretion of a fiduciary under the terms of the will are taxable. *Mississippi Valley Trust Co.* v. *Commissioner,* 72 F. (2d) 197 (C. C. A. 8th); cf. *Helvering* v. *Pardee,* Case No. 77, 290 U. S. 365, 370–1. The ruling of the court below is in full accord with both these lines of decision.

The Commissioner contended below that the deduction should be denied for an additional reason, namely, that the deed of trust did not direct that payments be made *from income.* It is settled that a trustee may not deduct payments to annuitants whose payments are not required to be made from income (*Helvering* v. *Pardee,* 290 U. S. 365), and the same principle should be applicable here. It is evident that Congress was dealing with the trustor's gifts of income, not with gifts made by the trustees. Accordingly, we submit that it is necessary to the allowance of a deduction that the

trustor identify the source of the gift as well as its object.

There is no conflict in the circuit courts of appeals on the narrow question determined in this proceeding. The petitioner suggests that the decision of the court below is in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *Hartford-Connecticut Trust Co.* v. *Eaton,* 36 F. (2d) 710. That case involved the question whether trust income had, pursuant to the trust instrument, been "permanently set aside" for charitable institutions within the meaning of Section 162 (a). Unlike this case where there is no direction by the trustor, the testator there had directed the disposition of the income, and the only question was whether his directions *definitely required* that income be "permanently set aside" for charitable purposes. The decedent had left the residue of his estate in trust, the income to be paid to his widow for life, the corpus to go to charities at her death. The will authorized the trustee to make payments to the widow from the corpus of the estate if "necessary or advisable for her comfortable maintenance and support." The trustee realized a capital gain in the sale of trust property which constituted income within the meaning of the revenue acts but which was corpus for the purposes of the trust. The collector argued that since the trustee was authorized to invade the corpus if necessary for the widow's support, the capital gain was not "permanently set aside" for charitable institutions. The Court construed the will as lim-

iting the trustee to the support of the widow in her habitual, thrifty, standard of living; and on demurrer interpreted an allegation of the taxpayer's complaint that "plaintiff would never have found it necessary to use the corpus for her (the widow's) support" to mean that the income was enough for that support according to her habit. 36 F. (2d) 710, 712. Whatever may be the correctness in that situation of the court's decision that the capital gain was "permanently set aside", it has no application here. The ruling but illustrates on the affirmative side the principle of *Boston Safe Deposit & Trust Co.* v. *Commissioner,* and *Guaranty Trust Company of New York* v. *Commissioner,* both *supra,* and in any event is certainly not in conflict with the decision of the court below. Neither the majority nor the one dissent below cited *Hartford-Connecticut Trust Co.* v. *Eaton* as opposed to the ruling of the court below, although that case was strongly urged in petitioner's brief. Morton, J., who dissented below, did so, to use his language, on "a very narrow question, depending on what is meant by the statutory expression, 'pursuant to the terms of the will or deed.'" (R. 93.) He merely was of the opinion on the basis of the meaning thought to be given to "pursuant to" in two old statutes and indictments unrelated to the necessities of a workable scheme of taxation, that these words should be read as if they were "authorized by."

Whether the income "is to be used exclusively for religious", etc., purposes within the meaning

of the statute raises no separate question. This provision permits deductions of income which, though not contributed directly to corporations, trusts, community chests, etc., meeting the requirements of Section 23 (n), "is to be used" for the stated purposes in some other manner. It seems clear that if it is required in the one case that contributions must be specifically directed by the deed of trust, the same requirement is attached to the deduction of income which is to be used for stated purposes otherwise than by contributions to such corporations, trusts, or community chests.

CONCLUSION

The decision of the Circuit Court of Appeals is correct, follows direct authority, and is uniform with settled rules in closely related fields of Federal taxation. There is no conflict of authorities, nor any broad or doubtful question of great moment to be settled. The petition for certiorari should be denied.

Respectfully submitted.

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MARCH 1937.

APPENDIX

Revenue Act of 1928, c. 852, 45 Stat. 791, 801, 838:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(n) *Charitable and other contributions.*—In the case of an individual, contributions or gifts made within the taxable year to or for the use of:

(1) the United States, any State, Territory, or any political subdivision thereof, or the District of Columbia, for exclusively public purposes;

(2) any corporation, or trust, or community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual;

(3) the special fund for vocational rehabilitation authorized by section 7 of the Vocational Rehabilitation Act;

(4) posts or organizations of war veterans, or auxiliary units or societies of any such posts or organizations, if such posts, organizations, units, or societies are organized in the United States or any of its possessions, and if no part of their net earnings inures to the benefit of any private shareholder or individual; or

(5) a fraternal society, order, or association, operating under the lodge system, but only if such contributions or gifts are to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals; to an amount which in all the above cases combined does not exceed 15 per centum of the taxpayer's net income as computed without the benefit of this subsection. Such contributions or gifts shall be allowable as deductions only if verified under rules and regulations prescribed by the Commissioner, with the approval of the Secretary. (For unlimited deduction if contributions and gifts exceed 90 per centum of the net income, see section 120.)

SEC. 161. IMPOSITION OF TAX.

(a) *Application of tax.*—The taxes imposed by this title upon individuals shall apply to the income of estates or of any kind of property held in trust, including—

(1) Income accumulated in trust for the benefit of unborn or unascertained persons or persons with contingent interests, and income accumulated or held for future distribution under the terms of the will or trust;

(2) Income which is to be distributed currently by the fiduciary to the beneficiaries, and income collected by a guardian of an infant which is to be held or distributed as the court may direct;

(3) Income received by estates of deceased persons during the period of administration or settlement of the estate; and

(4) Income which, in the discretion of the fiduciary, may be either distributed to the beneficiaries or accumulated.

(b) *Computation and payment.*—The tax shall be computed upon the net income of the

estate or trust, and shall be paid by the fiduciary, except as provided in section 166 (relating to revocable trusts) and section 167 (relating to income for benefit of the grantor). For return made by beneficiary, see section 143.

SEC. 162. NET INCOME.

The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—

(a) There shall be allowed as a deduction (in lieu of the deduction for charitable, etc., contributions authorized by section 23 (n)) any part of the gross income, without limitation, which pursuant to the terms of the will or deed creating the trust, is during the taxable year paid or permanently set aside for the purposes and in the manner specified in section 23 (n), or is to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, or for the establishment, acquisition, maintenance or operation of a public cemetery not operated for profit;

(b) There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, and the amount of the income collected by a guardian of an infant which is to be held or distributed as the court may direct, but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not. Any amount allowed as a deduction under this paragraph shall not be allowed as a deduc-

tion under subsection (c) of this section in the same or any succeeding taxable year;

(c) In the case of income received by estates of deceased persons during the period of administration or settlement of the estate, and in the case of income which, in the discretion of the fiduciary, may be either distributed to the beneficiary or accumulated, there shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is properly paid or credited during such year to any legatee, heir, or beneficiary, but the amount so allowed as a deduction shall be included in computing the net income of the legatee, heir, or beneficiary.

Treasury Regulations 74, promulgated under the Revenue Act of 1928:

ART. 862. *Method of computation of net income and tax.*—The Act provides that the tax computed upon the net income of the estate or trust shall be paid by the fiduciary, except as provided in sections 166 and 167. (See article 881.) However, in computing the net income of the estate or trust, the following deductions will be allowed either in addition to, or in lieu of (as the case may be), those specified in sections 23, 119, 213, and 251 in the case of individuals:

(1) If the terms of the will or of the deed creating the trust direct that any part of the gross income of the estate or trust (a) be paid or permanently set aside for charitable or other purposes, as specified in section 23 (n), or (b) be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, or for the establishment, acquisition, maintenance, or

operation of a public cemetery not operated for profit, such gross income so paid or set aside during the taxable year shall be allowed as a deduction in lieu of the deduction authorized by section 23 (n).

U. S. GOVERNMENT PRINTING OFFICE: 1939

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute and regulations involved	2
Statement	2
Summary of argument	7
Argument	9
I. The statute authorizes deduction only of those amounts paid, set aside or used for charitable purposes at the direction of the grantor	9
II. Even if the statute permits deduction of all payments authorized, petitioner has failed to establish that they were from gross income of 1931	20
III. Receipts of the trust for 1931 (above the amounts required to pay annuities and expenses) did not constitute income permanently set aside or to be "used exclusively for charitable purposes"	23
Conclusion	27
Appendix	28

CITATIONS

Cases:	
Bank of America National Association v. *Commissioner*, 19 B. T. A. 1273	15
Boston Safe Deposit & T. Co. v. *Commissioner*, 66 F. (2d) 179, certiorari denied, 290 U. S. 700	14, 19, 26
Bowers v. *Slocum*, 20 F. (2d) 350	14
Brewster v. *Gage*, 280 U. S. 327	13
Burger v. *Commissioner*, 12 B. T. A. 1391	17
Burnet v. *Houston*, 283 U. S. 223	20
Burnet v. *Thompson Oil & G. Co.*, 283 U. S. 301	20
Burnet v. *Whitehouse*, 283 U. S. 148	15, 16, 24
Chase, Jr. v. *United States*, 256 U. S. 1	19
Clark v. *Commissioner*, 8 B. T. A. 197	15
Cole v. *Ralph*, 252 U. S. 286	19
Estate of W. S. Tyler v. *Commissioner*, 9 B. T. A. 255	15
Friend v. *Talcot*, 228 U. S. 27	19
General Utilities & Operating Co. v. *Helvering*, 296 U. S. 200	19
Glaser v. *Commissioner*, 27 B. T. A. 313, affirmed, 69 F. (2d) 254, certiorari denied, 292 U. S. 654	16
Guaranty Trust Co. of New York v. *Commissioner*, 31 B. T. A. 19, affirmed, 76 F. (2d) 1010	18

Cases—Continued. Page

Hartford-Connecticut Trust Co. v. *Eaton*, 36 F. (2d) 710, affirming 29 F. (2d) 840 ... 25
Hartford-Connecticut Trust Co. v. *Eaton*, 41 F. (2d) 69 ... 26
Hartley v. *Commissioner*, 295 U. S. 216 ... 13
Heiner v. *Colonial Trust Co.*, 275 U. S. 232 ... 18
Helvering v. *Butterworth*, 290 U. S. 365 ... 15
Helvering v. *Gregory*, 293 U. S. 465 ... 20
Helvering v. *Pardee*, 290 U. S. 365 ... 8, 15, 24
Ithaca Trust Co. v. *United States*, 279 U. S. 151 ... 25
Lederer v. *Stockton*, 260 U. S. 3 ... 15, 17
McCaughn v. *Hershey Chocolate Co.*, 283 U. S. 488 ... 13
McClung v. *Commissioner*, 13 B. T. A. 335 ... 15
Mississippi Valley Trust Co. v. *Commissioner*, 72 F. (2d) 197, certiorari denied, 293 U. S. 604 ... 16
Moorman, Charles P., Home for Women v. *United States*, 42 F. (2d) 257 ... 13
Murphy Oil Co. v. *Burnet*, 287 U. S. 299 ... 13
New Colonial Co. v. *Helvering*, 292 U. S. 435 ... 20
Old Mission Co. v. *Helvering*, 293 U. S. 289 ... 13
Pacific Co. v. *Johnson*, 285 U. S. 480 ... 18
Potter v. *Bowers*, 15 F. Supp. 724 ... 18
Roebling v. *Commissioner*, 78 F. (2d) 444 ... 15
State Sav. Loan & Trust Co. v. *Commissioner*, 63 F. (2d) 482 ... 15
Sun-Herald Corp. v. *Duggan*, 73 F. (2d) 298 ... 18
Towne v. *Eisner*, 245 U. S. 418 ... 18
Welch v. *Commissioner*, 9 B. T. A. 1370 ... 15
Woolford Realty Co. v. *Rose*, 286 U. S. 319 ... 20
Wuchter v. *Pizzutti*, 276 U. S. 13 ... 19

Statutes:

Revenue Act of 1918, c. 18, 40 Stat. 1057:
Section 219 ... 12
Revenue Act of 1921, c. 136, 42 Stat. 227:
Section 219 ... 12
Revenue Act of 1924, c. 234, 43 Stat. 253:
Section 219 ... 12
Revenue Act of 1926, c. 27, 44 Stat. 9:
Section 219 ... 12
Revenue Act of 1928, c. 852, 45 Stat. 791:
Section 23 ... 28
Section 161 ... 29
Section 162 ... 30
Revenue Act of 1932, c. 209, 47 Stat. 169:
Section 162 ... 12

Statutes—Continued. Page
Revenue Act of 1934, c. 277, 48 Stat. 680:
Section 162 12
Revenue Act of 1936, c. 690, 49 Stat. 1648:
Section 162 12
Miscellaneous:
H. Rep. No. 179, 68th Cong., 1st Sess., p. 21 11
H. Rep. No. 844, 68th Cong., 1st Sess., p. 19 11
H. Rep. No. 1037, 65th Cong., 3d Sess., p. 52 11
S. Rep. No. 398, 68th Cong., 1st Sess., p. 25 11
S. Rep. No. 617, 65th Cong., 3d Sess 11
Treasury Regulation 45:
Article 342 12
Treasury Regulation 62:
Article 62 12
Treasury Regulation 65:
Article 342 12
Treasury Regulation 69:
Article 342 12
Treasury Regulation 74:
Article 862 31
Treasury Regulation 77:
Article 862 12
Treasury Regulation 86:
Article 162 12
Treasury Regulation 94:
Article 162 12

In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 703

OLD COLONY TRUST COMPANY, TRUSTEE, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 51–60) is reported at 33 B. T. A. 311. The opinion of the Circuit Court of Appeals (R. 77–84) is reported at 87 F. (2d) 131.

JURISDICTION

The judgment of the Circuit Court of Appeals for the First Circuit was entered December 10, 1936 (R. 84). The petition for writ of certiorari was filed February 4, 1937, and was granted March

15, 1937 (R. 85). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the petitioner, in computing its taxable net income as trustee for ~~the~~ year 1931, is entitled to deduct from its gross income certain amounts paid during the year to exempt religious, charitable, or educational corporations.

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved will be found in the Appendix, *infra*, pp. 28–31.

STATEMENT

The facts were stipulated before the Board of Tax Appeals (R. 18–50):

Henry Clay Jackson, of Boston, Massachusetts, died intestate, leaving Paul Wilde Jackson, a brother, as his sole heir (R. 24). Paul Wilde Jackson, apparently to carry out certain wishes of his brother, executed a deed of trust under date of July 19, 1922 (R. 24–31), whereby he conveyed to the petitioner, as trustee, all of his right, title, and interest in and to the property of Henry Clay Jackson remaining after payment of debts and other charges against the estate (R. 24).

The deed of trust, after providing for present distribution of a part of the property transferred and for the payment of stated annuities to a num-

ber of individuals, some of whom were still living during the taxable year involved, contained the further provision (R. 29):

> 13. I authorize my said trustees to pay to charities as hereinafter described such sums as in their judgment may be paid without jeopardizing the annuities herein provided for, whenever for a period of one year the trust fund held by them as then invested shall have yielded a net income equal to twice the amount of the annuities which they are then required to pay, and upon the death of the survivor of those persons, who under the terms of this instrument are to receive annual incomes under the trust hereby created, I direct my said trustees to distribute the rest and residue remaining in their hands among corporations and trustees organized, operating and holding exclusively for religious, charitable, scientific, literary or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, the sum paid over by said trustees to such corporations or boards of trustees to be held by such corporations and boards of trustees in trust, and the income thereof to be expended for the general purposes for which such corporations and boards of trustees are organized, and I request that said funds be designated by each corporation or board of trustees as the Henry Clay Jackson Fund.

The first property received by the petitioner under the deed of trust was received on May 29, 1923

(R. 20). The total value of property received under the trust deed is not shown, but it was apparently quite substantial (cf. R. 22). Upon receipt of the first trust principal by the petitioner, separate accounts were opened for principal and for income (exclusive of gains from sales of corpus, which were carried in the principal account). The principal account has always been maintained separate and apart from the income account, and no annuity payments or payments to charities have been charged to the principal account (R. 20). The amounts which the petitioner in its judgment considered available each year for payment to charities without "jeopardizing the annuities", the amounts appropriated to charities each year, and the years in which payments were made, were stipulated (R. 21).

The income account of the trust disclosed an unexpended balance at January 1, 1931, the beginning of the taxable year involved, of $187,999.43 (R. 34, 54). During the year 1931, the trust received net income of $164,339.39 (R. 19, 34–35, 54). Of this amount, $61,481.32 represented gains from sales of corpus which were added to the capital account and the balance of $102,858.07 represented income from other sources which was credited to the income account (R. 12, 12A, 19–21, 34–35, 54). During the year 1931, the trust expended $212,862.80, which was charged against the income account. Of this amount, $22,350 represented annuity payments and

$190,000 represented the payments to charities involved in this proceeding. This left a balance of $89,553.99 in the income account at the close of the taxable year (R. 21, 35, 54). There is no dispute that the $190,000 was paid to institutions of the type designated in Section 162 (a) of the Revenue Act of 1928 (R. 21–22).

The book value of the principal of the trust was $1,922,702.51 on January 1, 1931, and $1,989,043.50 on January 1, 1932. The market value of the securities and cash in the principal of the trust on January 2, 1931, was $2,119,835.81, and on December 31, 1931, was $1,488,140.43 (R. 22).

The ages of the nine annuitants still living in 1931 ranged from 54 to 85 years, and the total annuities paid or payable in 1931 amounted to $22,900. The cost of purchasing annuities for all of the annuitants in 1931, if purchased in the first six months of the year from The New York Life Insurance Company, would have been $220,804.33 (R. 23, 54).

The petitioner filed a fiduciary return for 1931 on Form 1041, showing the trust income apportioned to itself and to the annuitants (R. 19, 31–32, 55). It also filed an individual income tax return on Form 1040 for itself, as trustee, in which it reported as gross income the income apportioned to it on the fiduciary return and took a deduction of a like amount "Set aside for Charitable and Educational Purposes." Capital net gains from sales of

trust corpus held more than two years were also reported in the individual return filed by the petitioner and shown as "Set aside for Charitable and Educational Purposes" (R. 19, 32–33, 55).

In auditing the returns filed, the Commissioner of Internal Revenue determined net income to be $164,339.39, consisting of $61,481.32, representing gains from sales of trust corpus, and $102,858.07, income from other sources (R. 10–12, 19, 34–35, 54). He allocated the entire net income and capital net gain to the petitioner, as trustee, allowing no deduction for payments to annuitants or payments to charities, and determined the deficiency in controversy (R. 10–12A).

The Board of Tax Appeals sustained the Commissioner's action in disallowing the deduction for amounts paid to annuitants (R. 55), and that part of its decision was not appealed. The Board further held that any part of the gross income for 1931 which was paid to charities was deductible. However, it determined that the deed did not provide whether income or corpus should be used; and found that the trustees in 1931 really intended to distribute "income" theretofore accumulated; and that the evidence did not show that more than $2,000.57 of the 1931 income had been used in making the payments. Hence, the Board allowed a deduction of that amount (R. 55–59). Both parties appealed to the Circuit Court of Appeals for the First Circuit (R. 62, 71).

The Circuit Court of Appeals with one dissent reversed the Board, holding that no part of the sums paid was deductible, on the ground that Section 162 (a) allows deduction only of those sums paid or permanently set aside at the direction of the grantor, and does not authorize deduction of such sums paid or set aside by the trustee in the exercise of a discretion granted in the instrument (R. 77–84).

SUMMARY OF ARGUMENT

I

The trust deed gave to the petitioner a discretionary authority to make payments to charities and similar organizations. Section 162 (a) of the Revenue Act of 1928 (*infra*, p. 30) does not include such payments in allowing a deduction when made "pursuant to the terms of the will or deed creating the trust." To construe the Act otherwise makes the quoted qualification meaningless and requires that the administrative interpretation, confirmed by repeated reenactments, be ignored. Decisions on this and analogous questions point to a construction requiring the payments to be directed by the will or trust deed if the deduction is to be allowed.

That "pursuant to" often means "as authorized by" does not compel a mechanical application of this particular meaning in an alien context. The Congressional desire to benefit charities would be equally served by a complete omission of the quali-

fication and, in any event, may be supposed to be directed at trustors rather than the trustees. The question of the construction of the statute was properly in issue in the court below.

II

The deduction is limited to "any part of the gross income" which is paid, set aside, or is to be used for the purposes specified. This means the *current* income that would, but for the deduction, be subject to income tax. Thus, even though it be assumed that the statute permits deduction of payments made within the discretion of the trustee, it must be shown that they were made from current income; and the Board's determination that not more than $2,000.57 has been shown to have been so paid must be affirmed.

III

The petitioner's argument that the gross income earned in 1931 constituted sums which were directed by the trustee to be used exclusively for charitable purposes is based upon a misconstruction of the trust deed. The grantor directed its payment to charities only after the death of the survivor of the annuitants. The annuities were a charge upon both the income and the corpus. Thus, distribution of the residue could not occur until after satisfaction of all of the annuities. Cf. *Helvering* v. *Pardee*, 290 U. S. 365, 370. Whatever the

factual likelihood in 1931 that the charities would receive the amounts not paid to the annuitants, the legal fact remains that they had no certain interest in the corpus. This is the distinction drawn by the cases in this Court and in the lower courts.

ARGUMENT

I

THE STATUTE AUTHORIZES DEDUCTION ONLY OF THOSE AMOUNTS PAID, SET ASIDE, OR USED FOR CHARITABLE PURPOSES AT THE DIRECTION OF THE GRANTOR

The Circuit Court of Appeals held (R. 79):

> in order for payments to charitable institutions from the income of any particular year to be deductible, they must be directed by the person creating the trust and not be left to the judgment of the fiduciary. *Bowers* v. *Slocum et al.*, 20 Fed. (2d) 350, 352; *Guaranty Trust Co. of New York, Exr.*, v. *Commissioner*, 31 B. T. A. 19, 22; *Charles P. Moorman Home for Women et al.* v. *United States*, 42 Fed. (2d) 257 * * *.

We submit that this decision is required under the words of the statute, the consistent interpretation in the Treasury Regulations and the decisions of the courts. If, in the face of these authorities, there were any doubt, the general canons of construction of a taxing statute indicate that the decision must be affirmed.

1. Section 162 (a) of the Revenue Act of 1928 (*infra*, p. 30) allows a trustee to deduct from its

taxable income the amount which, "pursuant to the terms of the will or deed creating the trust", is during the taxable year paid or permanently set aside for charitable and other contributions.

The quoted qualification must be taken to have some meaning. Petitioner contends that it refers only to the requirement that the payments or disposition be authorized and would have this Court read it merely to mean that the trustee will be allowed no deduction for unauthorized contributions to charity. But Congress could hardly have been concerned with imposing tax sanctions in addition to the rigorous penalties afforded by a court of equity against breach of fiduciary duty. It must have designed its tax statutes to meet the ordinary situations, and not to impose on the estate an irrelevant denial of tax deductions merely because its trustee stepped beyond his authority. Under petitioner's construction the qualification to the allowed deduction would rarely, if ever, be operative. It would have no relation either to revenue collections or the encouragement of charitable institutions; had the limitation been omitted entirely one supposes that both charitable contributions and tax deductions would be in precisely the same volume as if petitioner's construction were adopted. If, therefore, the requirement that the contributions must be "pursuant to the terms of the will or deed creating the trust" is to have any reasonable meaning, it must mean that the trustee

must show something more than mere authority if he is to secure a deduction.[1]

This conclusion is reinforced by the contrasting language of subsection (c) of the same Section 162 (*infra*, p. 31). When dealing with payments to beneficiaries out of income which the trustee was authorized either to accumulate or distribute, the statute describes this authority as "in the discretion of the fiduciary." Had a similar latitude been intended in subdivision (a), Congress would assuredly have used the more precise term "in the discretion of the fiduciary" which is found in subdivision (c). Since "pursuant to" the will or trust deed must thus mean something more than a discretionary power, or non-mandatory authorization, it can mean only a mandatory direction.

2. Treasury Regulations 74, applicable here, provides in Article 862 (1) (*infra*, p. 31) that the deduction will be allowed "if the terms of the will or of the deed creating the trust *direct* that any part of the gross income of the estate or trust * * * be paid or permanently set aside for charitable or other purposes * * *." Petitioner apparently does not argue that deduction of the sums here in controversy is authorized under

[1] The committee reports throw no light on the proper interpretation of this provision. See Sen. Rep. No. 617, H. Rep. No. 1037 (p. 52), 65th Cong., 3d Sess.; H. Rep. No. 179 (p. 21), S. Rep. No. 398 (p. 25), H. Rep. No. 844 (p. 19), 68th Cong., 1st Sess.

this Regulation, and it seems plainly to be forbidden by its terms.

Article 862 (1) is identical with Article 342 (1) of Regulations 65 and 69, promulgated under the 1924 and 1926 Acts, and with Article 862 (1) of Regulations 77, promulgated under the 1932 Act.[2] So far as the present question is concerned, a similar interpretation was made under the Revenue Acts of 1918 and 1921.[3] Throughout this long history of administrative interpretation there have been repeated reenactments of the statutory provision without relevant change.[4] This failure to

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[2] Article 162–1 (1) of Regulations 86 and 94, promulgated under the 1934 and 1936 Acts constitute a rewritten version of the interpretation of Section 162. In the rewriting the word "directed" was omitted and the statute paraphrased as "by the terms of the will or of the instrument creating the trust." Whatever ambiguity the statute contains is thus duplicated in the Regulations after 1934. The earlier interpretation is, of course, not revoked but merely expressed in terms of the statute.

[3] Section 219 of the Revenue Acts of 1918 (c. 18, 40 Stat. 1057) and 1921 (c. 136, 42 Stat. 227) contained a similar qualification that the charitable contributions could be deducted only if made "pursuant to" the will or trust deed. This was interpreted in Article 342 of Regulations 45 and 62 to result in the tax being imposed if the trustee had discretion to accumulate or distribute, even though distributed to a tax-exempt beneficiary.

[4] The provision in its present form first appeared as Section 219, 1924 Act, c. 234, 43 Stat. 253; it was reenacted in Section 219, 1926 Act, c. 27, 44 Stat. 9; Section 162, 1928 Act, c. 852, 45 Stat. 791; Section 162, 1932 Act, c. 209, 47 Stat. 169; Section 162, 1934 Act, c. 277, 48 Stat. 680; Section 162, 1936 Act, c 690, 49 Stat. 1648.

change the section imports Congressional approval of the regulation, *Brewster* v. *Gage*, 280 U. S. 327, 337; *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488, 492; *Murphy Oil Co.* v. *Burnet*, 287 U. S. 299, 307, sufficient to give it the force of law, *Old Mission Co.* v. *Helvering*, 293 U. S. 289, 294; *Hartley* v. *Commissioner*, 295 U. S. 216, 220.

3. This Court has never considered the question now presented. But the decisions of the lower Federal courts leave small doubt as to the proper interpretation of the limitation upon the trustee's privilege to deduct charitable contributions.

The fullest discussion is found in *Charles P. Moorman Home for Women* v. *United States*, 42 F. (2d) 257 (W. D. Ky.), which involved the corresponding provision of the Revenue Acts of 1918, 1921, and 1924. The court's reasoning is typified by the following extract (pp. 260–261):

> The quoted language of section 219 of the act of 1918 makes it clear that the trust income, to be exempt from taxation as a charitable contribution, must be paid to or permanently set aside during the taxable year for a corporation organized and operated exclusively for charitable purposes, and that such payment or permanent setting aside must be pursuant to the terms of the instrument creating the trust. In other words, the instrument creating the trust must make it clear that it was the intention of the creator of the trust that such income should be paid

> during the taxable year to the charitable corporation or permanently set aside to it during such taxable year. The statute makes it very clear that it was not the intention of Congress to make the taxability of the income for any taxable year depend upon the discretion of the trustee in paying or permanently setting aside the income of the trust to the charitable purpose during the taxable year, but to depend solely upon the provisions of the instrument creating the trust.

In *Bowers* v. *Slocum*, 20 F. (2d) 350, 352 (C. C. A. 2d), the court said that the corresponding provision of the 1918 Act "does not make the deduction depend upon the action of the executors in crediting the income upon their books, but upon the permanent setting aside of the income by the will itself for corporations of the character in question."

In *Boston Safe Deposit & T. Co.* v. *Commissioner*, 66 F. (2d) 179 (C. C. A. 1st), certiorari denied, 290 U. S. 700, which arose under the Revenue Act of 1926, the court said (p. 183):

> The answers to the questions involved depend on whether the testator intended *by the terms of his will* that * * * any part of the income thereof can be considered as set aside permanently, for the purposes and in the manner specified in section 214 (a) (10) * * *. [Italics added.]

This construction of Section 162 (a) and the corresponding provision of other revenue acts seems to have been uniformly applied by the courts and the Board of Tax Appeals. *Clark* v. *Commissioner*, 8 B. T. A. 197; *Estate of W. S. Tyler* v. *Commissioner*, 9 B. T. A. 255; *Bank of America National Association* v. *Commissioner*, 19 B. T. A. 1273. See also *Welch* v. *Commissioner*, 9 B. T. A. 1370; *McClung* v. *Commissioner*, 13 B. T. A. 335; cf. *Lederer* v. *Stockton*, 260 U. S. 3.

The construction of Section 162 (a) adopted by the court below is in harmony with the construction placed upon other provisions of the taxing statutes having a similar purpose. Section 162 (b) of the 1928 Act (*infra*, p. 30) and the corresponding section of other revenue acts provide an additional deduction for the amount of trust income "which is to be distributed currently by the fiduciary to the beneficiaries." It has been held that unless the trust instrument unqualifiedly requires the distribution, the deduction is not allowable. *State Sav. Loan & Trust Co.* v. *Commissioner*, 63 F. (2d) 482 (C. C. A. 7th); *Roebling* v. *Commissioner*, 78 F. (2d) 444 (C. C. A. 3d).

The decisions of this Court in *Helvering* v. *Pardee*, 290 U. S. 365, 370–371 (decided with *Helvering* v. *Butterworth*, 290 U. S. 365), and *Burnet* v. *Whitehouse*, 283 U. S. 148, are based on this same principle. In the *Pardee* case the decedent had left the residue of his estate in trust and pro-

vided for the payment of an annuity of $50,000 to his wife. During the years considered the trustees had paid the annuity from income of the trust and claimed a deduction of the full amount as income "to be distributed currently by the fiduciary to the beneficiaries" within the meaning of Section 219 (b) (2) of the Revenue Act of 1926. In disallowing the deduction, this Court, following its decision in *Burnet* v. *Whitehouse, supra,* held that the annuity payments did not depend upon income of the trust estate, that they were payable without regard to the income derived by the trust estate, and that they were not distributions of income but payments in discharge of a gift or legacy. In the *Whitehouse* case, which involved the converse situation, the Court had already held that annuity payments were not taxable to the annuitant, although made from current income of the trust. In each case the emphasis was placed on the direction of the instrument creating the trust that the annuity should be payable in all events instead of providing that payment should only be made from income.

The same principle is applied in determining the right to deductions from gross estate, for purposes of computing the Federal estate tax, for gifts or bequests to charities. Such deductions are allowable only when definitely provided for by the testator in his will. *Mississippi Valley Trust Co.* v. *Commissioner,* 72 F. (2d) 197 (C. C. A. 8th), certiorari denied, 293 U. S. 604, 631; *Glaser* v. *Commis-*

sioner, 27 B. T. A. 313, affirmed on another issue, 69 F. (2d) 254 (C. C. A. 8th), certiorari denied, 292 U. S. 654; *Burger* v. *Commissioner*, 12 B. T. A. 1391.

4. Petitioner argues that Section 162 (a) should be construed in the light of the Congressional purpose to encourage charitable contributions. *Lederer* v. *Stockton*, 260 U. S. 3. We do not deny this purpose. We do doubt that it would be furthered by the construction petitioner urges.

It has earlier been pointed out (*supra*, p. 10) that this suggested purpose is not furthered by the inclusion of the words "pursuant to the terms of the will or deed creating the trust" if petitioner's construction is taken, since on that construction the words are virtually surplusage. More than that, however, it is reasonable to believe that the Government's construction of the phrase is likely to result in the application of larger amounts to charitable purposes. By directing the inducement to the trustor rather than to the trustee, Congress has furnished a strong incentive for the making of indefeasible gifts to charity by trustors, not subject to application by trustees to noncharitable purposes.

And while the beneficent purpose of Congress in dealing with charitable, religious, and educational institutions is well recognized, it is nevertheless true that a deduction for payments to such institutions, like other deductions from gross income, can only be allowed when clearly authorized by law.

Cf. *Sun-Herald Corp.* v. *Duggan*, 73 F. (2d) 298, 300 (C. C. A. 2d); *Guaranty Trust Co. of New York* v. *Commissioner*, 31 B. T. A. 19, 22, affirmed, *per curiam*, 76 F. (2d) 1010 (C. C. A. 2d); *Potter* v. *Bowers*, 15 F. Supp. 724 (S. D. N. Y.), pending on appeal to the Circuit Court of Appeals for the Second Circuit. And statutes authorizing such exemption are construed strictly in favor of the Government. Cf. *Heiner* v. *Colonial Trust Co.*, 275 U. S. 232; *Pacific Co.* v. *Johnson*, 285 U. S. 480.

5. The petitioner argues that the words "pursuant to" should be wrenched from their setting and given a lexicographer's definition based upon uses in wholly dissimilar situations. We see little to be gained if we were to follow the petitioner in its cataloging of the senses in which "pursuant to" has been used. We readily concede that it often means no more than "authorized in discretion to." It seems equally plain that in other contexts it means "acting under the direction of." A word is not a building block, of the same shape and serving the same purpose wherever placed, but as Mr. Justice Holmes, in *Towne* v. *Eisner*, 245 U. S. 418, 425, has said, "it is the skin of a living thought" whose content changes with its context. We submit that, as used in Section 162 (a), the phrase "pursuant to the terms of the will or deed creating the trust" can have a reasonable meaning, consistent with the Revenue Acts and their administrative interpretation, only if construed in its equally natural sense to mean as *directed* by the will or trust deed.

6. There remains only petitioner's suggestion (Br. 14–15) that the court below could not have decided the case on this ground if it was not raised in the Board of Tax Appeals or specifically assigned as error in the court below.[5] Petitioner relies on *General Utilities & Operating Co.* v. *Helvering*, 296 U. S. 200. This case has no bearing here. It grew out of a situation where a Circuit Court of Appeals reversed the Board of Tax Appeals on a ground not suggested before the Board and which turned on a question of fact which might have been developed in a different manner had the question been raised before the Board. Here the ground upon which the court below placed its decision was one purely of law—the construction of the statute. Nothing in the *General Utilities* case indicates an intention to overrule the settled doctrine that the appellate court has power to consider any question presented by the record. *Friend* v. *Talcot*, 228 U. S. 27, 36; *Wuchter* v. *Pizzutti*, 276 U. S. 13; *Cole* v. *Ralph*, 252 U. S. 286; *Chase, Jr.* v. *United States*, 256 U. S. 1. It is plain that there is no abuse of power in refusing to apply a statute without inquiry as to its meaning, even though the lower

[5] No new issue was raised in the Circuit Court of Appeals. The regulation construing section 162 (a) (Art. 862 (1) *infra*, p. 31) specifically provides that deduction will be allowed of that part of the gross income *directed* by the terms of the instrument to be paid or permanently set aside. The Commissioner disallowed the deduction on authority of *Boston Safe Dep. & Tr. Co.* v. *Commissioner*, *supra* (R. 11–12). This issue was necessarily raised before the Board (R. 3).

court did not pass on the question. In *Helvering* v. *Gregory*, 293 U. S. 465, this Court affirmed the Circuit Court of Appeals in deciding a tax controversy on a construction of the statute which was not urged in the Board of Tax Appeals.

II

EVEN IF THE STATUTE PERMITS DEDUCTION OF ALL PAYMENTS AUTHORIZED, PETITIONER HAS FAILED TO ESTABLISH THAT THEY WERE FROM GROSS INCOME OF 1931

The burden is upon the petitioner to establish its right to any deduction from gross income. Cf. *Burnet* v. *Houston*, 283 U. S. 223; *Burnet* v. *Thompson Oil & G. Co.*, 283 U. S. 301; *Woolford Realty Co.* v. *Rose*, 286 U. S. 319; *New Colonial Co.* v. *Helvering*, 292 U. S. 435.

Section 162 deals with the income earned by the trust during the taxable year. The increase or decrease of the principal is immaterial in this regard. Therefore in allowing a deduction of a part of "the gross income" the Act must refer to the gross income of the taxable year. It hardly could have been intended that payments out of corpus, or out of income accumulated during prior years, should be allowed as a deduction from this income. There is in this regard no difference whatever between the original corpus and the accumulated income; neither has relation to the income received during the taxable year.

The deed (R. 29) authorized the trustee to pay to charities "such sums as in their judgment may

be paid without jeopardizing the annuities * * * whenever for a period of one year the trust fund held by them as then invested *shall have* yielded a net income equal to twice the amount of the annuities * * *." The stipulation of facts shows that "the taxpayer considered that it had power to pay to charities defined in the trust instrument such parts of the *principal and income* of the trust" as would not jeopardize the annuities (R. 20). It seems very questionable whether the trustee was authorized to make payments from *current* income, since the measure of its authority was the income of past years. At any rate, payments were not limited to current income, and petitioner has not shown that all of the payments involved were made from current income. Obviously this could not have been the case, for payments aggregating $190,000 were made to charities during the year, while the gross income, including capital gains, amounted to only $175,319.18 (R. 54). The Board found (R. 57–58):

> The facts as stipulated show that the trustees, in making their appropriations, did not have in mind the income of the current taxable year. They considered only the income available on June 2, 1931. That consisted principally of the accumulated income of a prior year. The accumulated income at the beginning of the year amounted to $187,999.43. They made appropriations of $180,000. They paid in 1931, $160,000 of the amount thus appropriated and $30,000

> appropriated in 1929. These facts rather indicate that the trustees in 1931 really intended to distribute income theretofore accumulated rather than to distribute the current income of 1931. * * *
>
> * * * * * *
>
> * * * petitioner has not shown that more than $2,000.57 of the $190,000 was paid from gross income of 1931 * * *. Lynchburg Trust & Savings Bank et al., Trustees, 27 B. T. A. 1182. (reversed on other grounds, 68 F. (2d) 356).

This finding is not based, as petitioner would have it, upon the accident of the book entries of the trustee. It is found in the real distinction between current income, for income tax purposes, and the accumulated income which a trustee must often keep separate from the corpus. An analysis of petitioner's contention that it need only show payments from its income account discloses its unreasonable character. For, if it may deduct payments of "accumulated income" of prior years, it may thus secure a deduction which exceeds the gross income for the year. And a trustee could thus hold current income for individual beneficiaries and pay no tax thereon. In the instant case the $20,000 paid to annuities would go untaxed.

We submit it is clear that only payments to charities out of current income are deductible, and that petitioner has not shown that more than $2,000.57 of the payments in question, as the Board found, were made from that source.

III

RECEIPTS OF THE TRUST FOR 1931 (ABOVE THE AMOUNTS REQUIRED TO PAY ANNUITIES AND EXPENSES) DID NOT CONSTITUTE INCOME PERMANENTLY SET ASIDE OR TO BE "USED EXCLUSIVELY FOR CHARITABLE PURPOSES"

The petitioner argues (Br. 28–40) that if the $190,000 is not deductible as income "paid" pursuant to the terms of the deed creating the trust, then the gross income of the trust for 1931, in excess of the amounts required for annuity payments should be deducted as income "which pursuant to the terms of the will or deed creating the trust * * * is to be used exclusively for" the purposes designated in Section 162 (a) (*infra*, p. 30). The argument assumes a deduction is to be allowed only if the trust deed directed, rather than merely authorized, the exclusive use for charitable purposes (see Point I, *supra*) and asserts the proposition that the trust deed did direct this use of the trust funds. The contention is based upon the assumption that the income, as it was received by the trustee, was devoted to charitable purposes, subject only to a condition subsequent that the annuities be paid (Br. 29).

This basic postulate of the petitioner is unfounded. The payments to charities and similar organizations could take place only under paragraph 13 of the trust deed (R. 29). This gives the trustee, first, a discretionary power to make payments when the previous year's income has equalled twice the amount of annuities. Clearly

this provision does not constitute a direction that the income be devoted exclusively to charitable purposes. The second provision is:

> * * * upon the death of the survivor of those persons, who under the terms of this instrument are to receive annual incomes under the trust hereby created, I direct my said trustees to distribute the rest and residue remaining in their hands among corporations and trustees organized, operating and holding exclusively for religious, charitable, scientific, literary or educational purposes * * *.

It seems plain that, until the last of the annuitants has died, no sums have been set aside exclusively for charitable purposes. Whatever the actuarial and financial probability that the annuities will represent an inconsiderable claim on the trust estate, the fact remains that the will directs distribution to charities only after the annuities have been satisfied in full. This is not a present grant, subject only to life estates in the annuitants. By the terms of the trust deed the entire trust estate, income and principal alike, is devoted to the satisfaction of their claims. *Helvering* v. *Pardee*, 290 U. S. 365, 370; *Burnet* v. *Whitehouse*, 283 U. S. 148. Thus it cannot be said that any portion of the funds so held is "permanently set aside" or "to be used" *exclusively* for charitable purposes. Such were the holdings both of the Board (R. 56) and of the court below (R. 82).

The possibility, which had become a reality by 1931, that annuity requirements would decrease to

the point where there would be little reason to believe that any payment would ever have to be made from corpus, was taken care of by the provisions under which payments were made to charities during the year involved. These payments, however, were discretionary with the trustee and were essentially advance distributions of corpus. There is nothing in the trust instrument which can be construed as permanently setting aside any part of the excess income or capital gains prior to distribution.

The cases of *Hartford-Connecticut Trust Co.* v. *Eaton*, 36 F. (2d) 710 (C. C. A. 2d) and *Ithaca Trust Co.* v. *United States*, 279 U. S. 151, relied upon by the petitioner (Br. 29–32), do not require a contrary conclusion. The *Ithaca Trust Company* case considered the estate tax imposed under the Revenue Act of 1918 where the testator gave the residue of his estate to his wife for life with authority to use from the principal any sum "that may be necessary to suitably maintain her in as much comfort as she now enjoys." The remainder was to go to charities. The question was whether the value of this residue was deductible from the gross estate as a bequest to charities. It was held that the income of the estate was sufficient for this purpose, and that therefore this provision did not render the gifts to charities sufficiently uncertain to defeat the deduction. The *Hartford-Connecticut Trust Co.* case involved income taxes upon an estate held in trust, the income to be paid to the widow for life, with the remainder over to certain

charities. The will further authorized the trustee to pay over to the widow any part of the principal fund "which it may deem necessary or advisable for her comfortable maintenance and support." During the taxable year the trustee realized a gain from the sale of trust property, which under the terms of the will represented trust corpus distributable to charities. The court held that, since the income would always be sufficient for the widow's support, the gain from sales of corpus was permanently set aside for charitable purposes. In each of these cases the payments to the life beneficiaries required under the terms of the will were not a charge upon the corpus and the remainder might properly be said to be permanently set aside for the charities.

In *Boston Safe Deposit & Trust Co.* v. *Commissioner*, 66 F. (2d) 179 (C. C. A. 1st), certiorari denied, 290 U. S. 700, where the decedent's will provided for the payment of certain annuities which were ~~also~~ a charge upon the whole fund, the present principle was applied both to excess income and to gains from sales of corpus.[6] The court said (p. 184):

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[6] In *Hartford-Connecticut Trust Co.* v. *Eaton*, 41 F. (2d) 69 (D. Conn.), also relied upon by the petitioner (Br. 29), the testator's will provided for the payment of one annuity of $5,000, "and the entire income, *subject to the payment of said annuity*, to his wife" and after her death the trust fund to be held as a perpetual fund for charitable purposes. Here, again, there does not appear to have been a definite charge, even of this small amount, upon the entire fund.

It cannot be said, we think, and the testator was evidently of the same opinion, that there was no possibility that in periods of depression, such as occurred in 1929–33, it might not be necessary to use a part of the principal, together with any accumulated income, to meet all the fixed amounts to be paid "pursuant to the terms of the will."

CONCLUSION

For the reasons which have been set forth, we respectfully submit that the decision of the Circuit Court of Appeals is correct and should be affirmed.

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APRIL 1937.

APPENDIX

Revenue Act of 1928, c. 852, 45 Stat. 791, 801, 838:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(n) *Charitable and other contributions.*— In the case of an individual, contributions or gifts made within the taxable year to or for the use of:

(1) the United States, any State, Territory, or any political subdivision thereof, or the District of Columbia, for exclusively public purposes;

(2) any corporation, or trust, or community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual;

(3) the special fund for vocational rehabilitation authorized by section 7 of the Vocational Rehabilitation Act;

(4) posts or organizations of war veterans, or auxiliary units or societies of any such posts or organizations, if such posts, organizations, units, or societies are organized in the United States or any of its possessions, and if no part of their net earnings inures to the benefit of any private shareholder or individual; or

(5) a fraternal society, order, or association, operating under the lodge system, but

only if such contributions or gifts are to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals; to an amount which in all the above cases combined does not exceed 15 per centum of the taxpayer's net income as computed without the benefit of this subsection. Such contributions or gifts shall be allowable as deductions only if verified under rules and regulations prescribed by the Commissioner, with the approval of the Secretary. (For unlimited deduction if contributions and gifts exceed 90 per centum of the net income, see section 120.)

SEC. 161. IMPOSITION OF TAX.

(a) *Application of tax.*—The taxes imposed by this title upon individuals shall apply to the income of estates or of any kind of property held in trust, including—

(1) Income accumulated in trust for the benefit of unborn or unascertained persons or persons with contingent interests, and income accumulated or held for future distribution under the terms of the will or trust;

(2) Income which is to be distributed currently by the fiduciary to the beneficiaries, and income collected by a guardian of an infant which is to be held or distributed as the court may direct;

(3) Income received by estates of deceased persons during the period of administration or settlement of the estate; and

(4) Income which, in the discretion of the fiduciary, may be either distributed to the beneficiaries or accumulated.

(b) *Computation and payment.*—The tax shall be computed upon the net income of the estate or trust, and shall be paid by the

fiduciary, except as provided in section 166 (relating to revocable trusts) and section 167 (relating to income for benefit of the grantor). For return made by beneficiary, see section 143.

SEC. 162. NET INCOME.

The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—

(a) There shall be allowed as a deduction (in lieu of the deduction for charitable, etc., contributions authorized by section 23 (n)) any part of the gross income, without limitation, which pursuant to the terms of the will or deed creating the trust, is during the taxable year paid or permanently set aside for the purposes and in the manner specified in section 23 (n), or is to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, or for the establishment, acquisition, maintenance, or operation of a public cemetery not operated for profit;

(b) There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, and the amount of the income collected by a guardian of an infant which is to be held or distributed as the court may direct, but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not. Any amount allowed as a deduction under this paragraph shall not be allowed as

a deduction under subsection (c) of this section in the same or any succeeding taxable year;

(c) In the case of income received by estates of deceased persons during the period of administration or settlement of the estate, and in the case of income which, in the discretion of the fiduciary, may be either distributed to the beneficiary or accumulated, there shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is properly paid or credited during such year to any legatee, heir, or beneficiary, but the amount so allowed as a deduction shall be included in computing the net income of the legatee, heir, or beneficiary.

Treasury Regulations 74, promulgated under the Revenue Act of 1928:

ART. 862. *Method of computation of net income and tax.*—The Act provides that the tax computed upon the net income of the estate or trust shall be paid by the fiduciary, except as provided in sections 166 and 167. (See article 881.) However, in computing the net income of the estate or trust, the following deductions will be allowed either in addition to, or in lieu of (as the case may be), those specified in sections 23, 119, 213, and 251 in the case of individuals:

(1) If the terms of the will or of the deed creating the trust direct that any part of the gross income of the estate or trust (a) be paid or permanently set aside for charitable or other purposes, as specified in section 23 (n), or (b) be used exclusively for religious, charitable, scientific, literary, or edu-

cational purposes, or for the prevention of cruelty to children or animals, or for the establishment, acquisition, maintenance, or operation of a public cemetery not operated for profit, such gross income so paid or set aside during the taxable year shall be allowed as a deduction in lieu of the deduction authorized by section 23 (n).

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SUPREME COURT OF THE UNITED STATES.

No. 703.—October Term, 1936.

Old Colony Trust Company, Trustee, Petitioner, vs. Commissioner of Internal Revenue.	On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit

[May 17, 1937.]

Mr. Justice McReynolds delivered the opinion of the Court.

Under trust deed of July 19, 1922, the Old Colony Trust Company came into possession of valuable income producing property from which to pay certain sums and satisfy specified annuities. The deed continues:

"13. I authorize my said trustees to pay to charities as hereinafter described such sums as in their judgment may be paid without jeopardizing the annuities herein provided for, whenever for a period of one year the trust fund held by them as then invested shall have yielded a net income equal to twice the amount of the annuities which they are then required to pay, and upon the death of the survivor of those persons, who under the terms of this instrument are to receive annual incomes under the trust hereby created, I direct my said trustees to distribute the rest and residue remaining in their hands among corporations and trustees organized, operating and holding exclusively for religious, charitable, scientific, literary or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, the sum paid over by said trustees to such corporations or boards of trustees to be held by such corporations and boards of trustees in trust, and the income thereof to be expended for the general purposes for which such corporations and boards of trustees are organized, and I request that said funds be designated by each corporation or board of trustees as the Henry Clay Jackson Fund."

Each year after 1923 the estate's income was more than twice the amount necessary for the annuities. The trustee has kept separate principal and income accounts. From 1925 to 1933 all

annuities were duly paid and considerable sums went to charities; none of these payments was charged to the principal account. Tax returns have been based upon actual receipts and disbursements.

January 1, 1931, the income account showed unexpended balance of $187,999.43. During that year the income received amounted to $164,339.39; the trustee expended and charged against income account $212,862.80, of which $190,000.00 went to charities. The 1931 tax return claimed deductions for charity payments up to the amount of the year's income. The Commissioner disallowed this because "it is not disclosed that payments were made out of income of the taxable year to the charities nor that any portion of the income was credited to any charity."

The Board of Tax Appeals held the trustee must affirmatively prove the payments in question were from income received during 1931; also, that except as to a small sum, it had not sustained the necessary burden of proof.

The Circuit Court of Appeals ruled that none of the contributions was deductible because not imperatively directed by the trust deed. It took the view that as the trustee exercised discretion as to payment they were not made "pursuant to the terms of the . . . deed creating the trust". Accordingly, it approved the Commissioner's assessment and remanded the cause to the Board.

The matter is here by certiorari. Annuity payments are not now in controversy. Two questions are presented and both must be answered in the negative.

I.—Under Section 162, Revenue Act, 1928, 45 Stat. 838, copied in the margin, is it necessary that the will or deed creating a trust definitely direct the charitable contributions which are claimed as deductions?[1]

Section 23n of the 1928 Act which authorizes certain deductions for charitable contributions by individuals does not confine them to

[1] Revenue Act, 1928, Sec. 162, 45 Stat. 838.

"Sec. 162. Net Income.

"The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—

"(a) There shall be allowed as a deduction (in lieu of the deduction for charitable, etc., contributions authorized by section 23 (n)) any part of the gross income, without limitation, which pursuant to the terms of the will or deed creating the trust, is during the taxable year paid or permanently set aside for the purposes and in the manner specified in section 23 (n), or is to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, or for the establishment, acquisition, maintenance or operation of a public cemetery not operated for profit; . . . (b) and (c)."

payments actually made from income, but does limit their amount to 15% of the net received during the year.[2] In lieu of these deductions, Section 162a permits trust estates to deduct charitable contributions to the full extent of gross income when made pursuant to the trust deed.

We are asked to hold that the words "pursuant to" mean directed or definitely enjoined. And this notwithstanding the admission that Congress intended to encourage charitable contributions by relieving them from taxation. *Lederer, Collector* v. *Stockton*, 260 U. S. 3; *United States* v. *Provident Trust Co., Administrator*, 291 U. S. 272, 285.

"Pursuant to" is defined as "acting or done in consequence or in prosecution (of anything); hence, agreeable; conformable; following; according."[3]

The words of the statute are plain and should be accorded their usual significance in the absence of some dominant reason to the contrary. We find nothing in the regulations or practice of the Treasury Department or in the general purpose of the statute which

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[2] Revenue Act, 1928, Sec. 23, 45 Stat. 799:

"Sec. 23. Deductions from Gross Income.

In computing net income there shall be allowed as deductions: . . . (a), (b), etc.

(n) Charitable and other contributions.—In the case of an individual, contributions or gifts made within the taxable year to or for the use of:

(1) the United States, any State, Territory, or any political subdivision thereof, or the District of Columbia, for exclusively public purposes;

(2) any corporation, or trust, or community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual;

(3) the special fund for vocational rehabilitation authorized by section 7 of the Vocational Rehabilitation Act;

(4) posts or organizations of war veterans, or auxiliary units or societies of any such posts or organizations, if such posts, organizations, units, or societies are organized in the United States or any of its possessions, and if no part of their net earnings inures to the benefit of any private shareholder or individual; or

(5) a fraternal society, order, or association, operating under the lodge system, but only if such contributions or gifts are to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals;

to an amount which in all the above cases combined does not exceed 15 per centum of the taxpayer's net income as computed without the benefit of this subsection. Such contributions or gifts shall be allowable as deductions only if verified under rules and regulations prescribed by the Commissioner, with the approval of the Secretary. (For unlimited deduction if contributions and gifts exceed 90 per centum of the net income, see section 120.)"

[3] Webster's New International Dictionary, Unabridged, 2nd ed., 1935.

requires the narrow meaning advocated by respondent. Neith
the Commissioner nor the Board of Tax Appeals accepted or m
tioned with favor the interpretation which his counsel now advan
and this is hardly compatible with the theory of controlling rulin
or practice by the Bureau.

The questioned donations were made by the petitioners in pu
suance of the trust deed.

II.—In order that they may be allowed as deductions is it nec
sary affirmatively to show that charitable contributions by a tru
estate were actually paid out of income received during the ye
in which they were made?

Section 23n limits deductible contributions to 15% of net in
come. Section 162a permits them to the full extent of gross in
come. This language should be construed with the view of carry
ing out the purpose of Congress—evidently the encouragement
of donations by trust estates. There are no words limiting the
to something actually paid from the year's income. And so t
interpret the Act could seriously interfere with the beneficen
purpose. One creating a trust might be unwilling to bind it abs
lutely to pay something to charity but would authorize his truste
so to do after considering then existing circumstances.

Capital and income accounts in the conduct of the business of
estates are well understood. Congress sought to encourage don
tions out of gross income, and we find no reason for saying that i
intended to limit the exemption to sums which the trust could show
were actually paid out of receipts during a particular tax year.
The design was to forego some possible revenue in order to promot
aid to charity. Here the trustee responded to an implied invita
tion and the estate ought not to be burdened in consequence.

The judgment of the court below must be reversed and the
cause returned there for further procedings in harmony with thi
opinion.

Reversed.